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No. 08-

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA ET AL.,
Petitioners,

v.

VIOLA NAOMI WASHINGTON ALLEN ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of Louisiana, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARY S. JOHNSON
JOHNSON GRAY MCNAMARA, LLC
21357 Marion Lane
Suite 300
Mandeville, Louisiana 70471
(985) 246-6544

JONATHAN D. HACKER
(*Counsel of Record*)
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioners
(Additional Counsel Listed on Inside Cover)

JAMES M. GARNER
SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.
909 Poydras Street
28th Floor
New Orleans, Louisiana 70112
(504) 299-2100

JAMES MARTIN
COHN BAUGHMAN
& MARTIN
333 West Wacker Drive
Suite 900
Chicago, Illinois 60606
(312) 753-6600

RICHARD W. BRYAN
JACKSON & CAMPBELL, P.C.
1120 20th Street, N.W.
South Tower
Washington, D.C. 20036
(202) 457-1638

Additional Counsel for Petitioners

QUESTIONS PRESENTED

Petitioners are insurance companies that issued policies to a housing authority in connection with its operation of an affordable housing development. A class action was brought against the housing authority in Louisiana state court after it was discovered that the land on which the development was built was contaminated.

The trial court awarded, and the Louisiana Court of Appeal approved, damages to individuals for their personal emotional distress and lost individual property value on the basis of evidence that was not specific to those individuals, but was based entirely on classwide formulas. The state court also directed the insurance companies to pay "all sums" owed by the housing authority to the class – including damages owed to plaintiffs who did *not* live on the insured property – subject only to a right to seek contribution from the insured and other defendants for any amount beyond the policies' terms.

The questions presented are:

1. Whether the Due Process Clause permits a court to order insurers to pay damages on behalf of an insured that are concededly outside the limits of the insurers' policies and not otherwise attributable to them.

2. Whether the Due Process Clause permits a court to assess damages in a class action for injuries that are unique to the claimants on an aggregate basis that does not take each claimant's individual circumstances into account.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners are National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and U.S. Fire Insurance Company ("U.S. Fire"). National Union is a direct, wholly-owned subsidiary of AIG Commercial Insurance Group, Inc., which is a wholly-owned subsidiary of AIG Property Casualty Group, Inc., which is a wholly-owned subsidiary of American International Group, Inc., a publicly traded corporation. U.S. Fire is an indirect subsidiary of ACE Limited, a publicly traded corporation.

Respondents are individuals who are class representatives in this class action. They are Phyllis Minerva George Smith, Don Harrison Lewis, Sr., Nathan Parker, Viola Naomi Washington Allen, Peggy Williams Grandpre, Lizette Gaines Watson, Fannie Lee Johnson, Iris Russell Myers, and Diarra Ayodele McCormick. The case was captioned *John Johnson et al. v. Orleans Parish School Board et al.* in the lower courts, but John Johnson is not presently a named class representative and the Orleans Parish School Board is not joined in this petition.

The other parties who participated in the proceedings before the Louisiana Court of Appeal are the City of New Orleans, the Housing Authority of New Orleans, the Orleans Parish School Board, Republic Insurance Company, and Louisiana Insurance Guaranty Association (as successor in interest to Southern American Insurance Company).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of Louisiana, Fourth Circuit, in this case.

DECISIONS BELOW

The opinion of the Louisiana Court of Appeal is reported at 975 So. 2d 698 and is reprinted in the Appendix ("App.") hereto at 1a. The trial court's judgment and reasons for judgment are unreported and are reprinted at App. 41a and App. 65a.

JURISDICTION

The opinion of the Louisiana Court of Appeal was issued on January 30, 2008. The Court of Appeal denied petitioners' applications for rehearing on February 27, 2008. The Supreme Court of Louisiana denied petitioners' applications for a writ of certiorari on June 27, 2008. Justice Scalia extended the time in which to file this petition to October 27, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Section 2403(b) of Title 28 of the United States Code may apply. This petition has been served on the Attorney General of the State of Louisiana.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause, U.S. Const. amend. XIV, provides:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

There are few principles of due process more basic than that forbidding the government simply to "take[] property from A. and give[] it to B." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.). But the decision below does exactly that. Petitioner insurance companies issued policies that, the state court expressly acknowledged, covered only *part* of the damages owed by the insured tortfeasor to respondents. The court nonetheless announced that the insurers were obligated to pay damages beyond their coverage terms, subject only to an illusory right of contribution from the insured or other defendants for the amounts beyond the policies' coverage. That holding lacks any justification in law or contract, and it contravenes the insurers' rights to due process.

The state court ran afoul of a second due process protection as well. The plaintiffs in this class action sought emotional distress and lost property value damages based on the contamination of their respective properties with toxic substances. Rather than determine these inherently individualized compensatory damages on individual proof, the state court assessed them on the basis of classwide formulas. That end-run around the necessary proof deprives the defendants of the chance to address each plaintiff's *actual* damages, thus denying them their fundamental due process right "'to present every available defense.'" *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

The Louisiana Court of Appeal enlarged the damages available to the class plaintiffs by disregarding due process principles long settled by this Court and consistently respected among lower courts. The judgment below cannot stand.

A. Factual Background

The City of New Orleans used a parcel of land in its Ninth Ward as a municipal landfill until 1958, and again in 1965. App. 4a. Beginning in 1967, the site – known as the Agriculture Street Landfill ("ASL") – was host to a number of development projects. App. 5a-6a. The first was an affordable housing development known as "Press Park": following an agreement between the City and the Housing Authority of New Orleans ("HANO"), a private developer constructed the Press Park homes, and in 1971 HANO purchased and began operating the Press Park properties. App. 5a. A portion of some Press Park tenants' rent went toward the purchase of their houses. *Id.* HANO was not involved with other developments on the ASL site, including a tract of housing built by the City known as "Gordon Plaza," and an elementary school built by the Orleans Parish School Board. *Id.*

Between 1976 and 1985, HANO obtained a succession of comprehensive general liability insurance policies related to its operation of Press Park; it was otherwise uninsured. App. 25a-26a. Petitioner U.S. Fire's policy was in effect from 1978 to 1981; petitioner National Union's policy was in effect from 1981 to 1984. *Id.*

In 1993, the Environmental Protection Agency ("EPA") conducted tests on the ASL site and deter-

mined that the soil was contaminated with toxic materials. App. 7a. In 1994, the agency pronounced the area a Superfund site. *Id.* The EPA financed a $20 million remediation project in which one to two feet of contaminated soil was replaced and a barrier laid down between the clean and contaminated layers. App. 8a. The EPA notified residents of the completed project, issued restrictions on the use of their property, and advised them that they were responsible for looking after the clean topsoil and barrier. *Id.*

B. Proceedings Below

1. A number of persons with some connection to the ASL site filed a class action against the City, HANO, the School Board, and HANO's former insurers,[1] seeking recovery in tort for emotional distress and lost property value damages owing to the site's contamination. Four plaintiff sub-classes were certified: (1) persons who resided on or near the ASL site for at least a year before 1994; (2) persons who operated a business on or near the site for at least a year before 1994, and their employees; (3) current residents of the site or the area nearby who own or are buying their homes; and (4) former employees of and students at the elementary school on the site, who attended or worked at the school for at least a school year before 1994. App. 9a.

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[1] The plaintiffs were authorized to sue the insurers directly pursuant to La. Rev. Stat. § 22:655(B), which provides: "The injured person . . . shall have a right of direct action against the insurer within the terms and limits of the policy . . . ."

2. After a bench trial, the trial court entered judgment in favor of the plaintiffs. App. 66a. The trial court found that the City, HANO, and the School Board were negligent and that their negligence was a cause of the plaintiffs' damages; it also found that HANO was strictly liable to the Press Park tenants and residents. App. 104a-106a.

But HANO's liability did not stop with the Press Park property owners and tenants, the court concluded. Instead the court found HANO jointly liable with the City for *all* development on the ASL site – even though HANO had nothing to do with the planning, construction, or management of any project but Press Park. App. 107a-109a.[2] The court held that HANO could be made liable for pre-existing contamination on *other* property because a cooperative agreement HANO and the City executed in 1967 for the purpose of building Press Park "was still in place in the late 1970s, when the next phases of the neighborhood were planned." App. 109a. The court did not explain how an agreement HANO entered into solely to facilitate construction of Press Park could force HANO to incur liability for the City's own, entirely separate development efforts a decade later.

The court also held HANO solidarily liable with the City to plaintiffs in the area *adjacent* to the ASL site. App. 51a-52a. But many of the homes and businesses in the adjacent area were built *decades*

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[2] The Court applied Louisiana's pre-1980 law of joint – or "solidary" – liability. That statute was amended in 1980, and did not impose solidarity liability after that date for HANO's conduct.

before HANO's 1967 Cooperative Agreement with the City, while the ASL site was still a landfill. *See* HANO 4th Cir. Corr. Orig. Br. 1. Again, the court did not explain how HANO's cooperative agreement with the city for the development of Press Park could force HANO to incur liability for property HANO did not develop, and indeed which was developed long before HANO even came on the scene.

As for the insurers' liability, the trial court ruled that the plaintiffs' claims for emotional distress and property damages were covered under the "Personal Injury Liability" ("PIL") provisions of HANO's insurance policies, which applied to "personal injury . . . arising out of" the "offense[]" of "wrongful entry or eviction, or other invasion of the right of private occupancy . . . committed during the policy period." App. 32a; *see* App. 111a. The court considered HANO's interference with plaintiffs' "use and enjoyment of their property" to be equivalent to an invasion of the right of private occupancy. *Id.*[3]

In the trial court's judgment, each insurer's liability was confined to the plaintiffs who were exposed to contaminated soil during that insurer's policy period, and was subject to the insurer's policy limits. App. 53a-55a, 57a-58a. But their liability was *not*

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[3] Moreover, though "bodily injury" as used in the policies would appear by definition to apply to tangible physical injuries, not intangible emotional harms, the court found that emotional distress did in fact amount to "bodily injury" (App. 114a), despite plaintiffs' stipulation below that they were not making any claims for "bodily or personal injury." *See* National Union 4th Cir. Orig. Br. 15. Plaintiffs further stipulated that the National Union CGL policy did not provide coverage for "property damage." *See id.*

confined to residents of Press Park, the only insured property. Rather, without explanation, the trial court held that the insurers were, like HANO, liable to plaintiffs on uninsured property, even though the insurers, *unlike* HANO, were not solidarily liable to them. App. 53a-55a.[4]

Last, the court addressed the question of damages. The plaintiffs' expert had examined five homes and testified that their values had gone down by 17% to 35% as a result of stigma associated with the contamination. National Union Writ App. 20-21. And the record established that some plaintiffs sold property located on the ASL site for *more* than fair market value. HANO Opp. to Pltfs.' Writ App. 5. The trial court nevertheless held that plaintiffs residing within the ASL site were entitled to damages "in the *full amount* of [the property's] present fair market value." App. 117a (emphasis added). For those class members who owned property in the area *adjacent* to the ASL site, the court announced the appropriate measure of damages was "ten percent (10%) of [the

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[4] Thus, for example, the trial court held petitioner U.S. Fire liable to Lizette Gaines, who lived in the adjacent area. App. 53a, 83a-84a. And it held petitioner National Union liable to Ms. Gaines as well as to Nathan Parker, Viola Allen, Peggy Grandpre, and Diarra McCormick, who lived in the City's Gordon Plaza development. App. 54a, 80a-86a. None of those plaintiffs' properties were covered by the relevant insurance policies. *See* App. 31a-32a ("The company will pay on behalf of the insured all sums which the insured . . . shall become legally obligated to pay as damages because of injury . . . arising out of [a listed] offense[] *committed in the conduct of the named insured's business*" (emphasis added)).

property's] fair market value," a figure for which it gave no explanation. *Id.*

Although the trial court also held that class members who lived or worked on the ASL site began to suffer emotional distress only in 1994 "due to the shocking realization . . . that their homes and businesses were located on a 'Superfund Site'" (App. 122a),[5] their damages were to be assessed according to each plaintiff's "years of residence on the ASL site" beginning in 1972 and ending on August 29, 2005, when the site was hit by Hurricane Katrina and "rendered . . . uninhabitable." App. 124a. The trial court set damages figures according to periods of residence – so, for example, plaintiffs who lived on the site for 5 to 10 years received $25,000 total, while plaintiffs who lived there for 15 to 20 years received $40,000. *Id.* The court held that plaintiffs who lived in the adjacent area were entitled to lower, fixed damages for their emotional distress – each would receive $2,500. App. 125a.

3. The Louisiana Court of Appeal affirmed in relevant part, though it reduced the damages awards somewhat. The court decided the property damages awards of 100% property value were valid because "[t]here is objective evidence in the record to make

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[5] The asserted injuries thus arose well after the effective dates of any of the insurance policies at issue. The court nevertheless held that the claims arose within the policy periods because some *exposure* occurred during the policy periods – an inexplicable finding, given that PIL coverage requires the commission of an enumerated intentional offense during the policy period. *See supra* at 6.

such a finding reasonable." App. 22a.[6] Though it found the formulas for assessing emotional distress damages unobjectionable, the court found that the amounts awarded "shock[ed] the conscience" in the absence of physical injury and in its discretion reduced them by 50% across the board. App. 24a. The court did not address the defendants' argument on appeal that both the property value and the emotional distress damage awards violated their rights to due process by imposing an arbitrary formula to decide questions of fact peculiar to the particular plaintiff and property. HANO 4th Cir. Corr. Orig. Br. 33-36. The court also did not discuss the defendants' argument that the awards lacked evidentiary support because the plaintiffs' expert testified that the properties *retained* much of their value, and because there was no connection in the record between the length of residence at the site and emotional distress suffered (particularly since the plaintiffs got damages for decades before they learned of the contamination). *Id.* at 40-45; National Union 4th Cir. Orig. Br. 42-44.

With one dissent, the appellate court agreed with the trial court that the PIL provisions of the insurance policies covered plaintiffs' claims. App. 27a-28a. The court did not seriously address the insurers' argument that at minimum they could not be liable to non-Press Park residents, whose claims against HANO were predicated entirely on HANO's solidary liability with the City. U.S. Fire 4th Cir.

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[6] The court did not specifically identify any evidence in the record it relied upon to support the trial court's determination that the property was worthless.

Orig. Br. 18-20. The court simply gave the insurers a right of contribution, "clarify[ing]" that the insurers "should have to pay all sums owed by HANO to the class, subject to their right to seek contribution from the other insurers, HANO, and the City for any sums they are obligated to pay for claims that fall outside of their terms of coverage." App. 29a. The Court of Appeal thus sanctioned unmitigated monetary liabilities on petitioner insurers that were far beyond the terms of their policies, even as construed by the Court of Appeal.[7]

4. The insurers filed applications for rehearing, arguing that the Court of Appeal's "all sums" liability holding violated their right under the Due Process and Contracts Clauses of the U.S. Constitution by rendering them liable for amounts concededly outside their policy terms. Republic Ins. Co. Reh'g App. 12-13. The Court of Appeal denied rehearing, with Judge Cannizzaro voting to grant. App. 128a.

5. The insurers sought review in the Louisiana Supreme Court, arguing that both the classwide, nonindividuated damages ruling and the extra-policy liability ruling were unconstitutional. National Union Writ App. 1; Republic Ins. Co. Writ App. 20-23. The Louisiana Supreme Court denied review, with

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[7] Judge Cannizzaro strongly dissented from the majority's conclusion that the PIL provisions covered the plaintiffs' emotional distress and property value claims. App. 32a. Judge Cannizzaro recognized that the PIL coverage was limited to the commission of certain enumerated intentional torts (*i.e.*, "offenses"), App. 34a, and observed that not only was HANO's conduct not found to be intentional, App. 35a-36a, but also the requisite interference with a possessory interest was lacking here, App. 39a-40a.

Chief Justice Calogero and Justice Victory voting to grant. App. 129a-132a.[8] This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents two important questions that warrant resolution by this Court.

First, the decision below holds that one private party may be compelled by a court to pay money to another party *even absent any existing legal obligation*. The appellate court in this case required petitioner insurers to pay "all sums" owed to plaintiffs, including damages concededly outside the coverage terms of the insured's policies. No contract, tort rule, or statute imposed on the insurers a duty to pay damages for injuries arising from property outside HANO's Press Park development – they were owed by *the insured*, and *only* by the insured as a solidary obligor with another uninsured defendant (the City). But in an extraordinary deus ex machina, the decisions below simply pronounce that the insurers bear the primary obligation to pay damages to all plaintiffs, without citing a single principle of Louisiana or federal law that could possibly authorize such a naked wealth transfer.

And of course there is none. To the contrary, the decision below contradicts centuries of this Court's precedents prohibiting the Government – including the judicial branch – from simply forcing one party to pay money to another without some basis in law establishing (and giving notice of) the obligation.

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[8] The insurers again raised the latter due process issue in an application for reconsideration, which was not considered. App. 133a.

See infra at 15-19. And it likewise contradicts precedents from other state courts uniformly holding that courts cannot impose on insurers payment obligations beyond those established by the terms of the agreement or positive law. *See infra* at 20-21. Absent review and reversal of the decision below, insurers in Louisiana will be forced to incur monetary liabilities that vastly exceed their policies' unambiguous coverage terms, jeopardizing the resources available to pay actual, covered claims, and undermining the ability of insurers to continue to write affordable insurance in Louisiana.[9]

Second, the decision below awards plaintiffs personal, compensatory damages for actual losses – not statutory damages or civil fines – without requiring *any* evidence establishing the existence or amount of any actual individual losses. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); *see also Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Petitioners were denied that fundamental procedural due process right because the trial court's formulaic classwide damages rule rendered individualized

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[9] The Court of Appeal's ruling does not disturb the trial court's ruling that, apart from the liability to non-Press Park residents, each insurer was liable only according to its policy period and terms of coverage. App. 57a-58a. Plaintiffs below noted that they "have never contested that the liability of each of HANO's insurers is governed by the '*applicable* limits of liability' of each insurer's policy." Pltfs. Opp. to U.S. Fire Writ App. 19.

damages evidence irrelevant, denying petitioners their fair opportunity to contest each individual plaintiff's claim of actual loss.

Compensatory damages "necessarily implicate[] the subjective differences of each plaintiff's circumstances," and for this reason they are inherently "an individual, not class-wide, remedy." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998). The courts below, however, held that plaintiffs would *not* be required to establish their individual losses based on the "each plaintiff's circumstance," but instead could show both personal emotional injuries and loss to specific property values solely through classwide arithmetic formulas. The rulings below thus foreclosed petitioners from arguing that plaintiffs did *not*, in fact, suffer actual losses – by showing, for example, that an individual plaintiff did not experience any emotional injury or that her own property did not decline in value. The decisions below contradict not only the precedents of this Court establishing the basic procedural due process right to defend against a damage claim, but also precedents of the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, as well as other state courts, recognizing that when plaintiffs assert damages claims that necessarily turn on individual circumstances of loss, such damages "may be awarded only if the plaintiff submits proof of actual injury." *Id.* at 417.

* * * *

Both issues raised here reflect denials of due process of law in the most literal sense. With no explanation or justification, the decision below compels petitioners to assume monetary liabilities unauthor-

ized by contract or by any rule of common or positive law. And the decision compels both the insurers and their insured to pay damages for individual losses without *any process at all* – much less "due" process – to determine the existence and extent of those individual losses. Neither ruling can be squared with the precedents of this Court and numerous lower courts delineating the core requirements of due process in all U.S. court systems.

Certiorari should be granted.

I. THE DECISION BELOW DEPRIVES PETITIONERS OF PROPERTY WITHOUT ANY EXPLANATION OR LEGAL JUSTIFICATION, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHERS

Petitioners issued comprehensive general liability policies to HANO in connection with its operation of Press Park. The policies provided that petitioners would pay covered damages on HANO's behalf, but only as to certain enumerated offenses committed by HANO in the conduct of its business. App. 31a-32a. The policies' coverage is not in dispute here. It is not the subject of any ambiguity or interpretation. The state courts did not adopt a contested construction of the policy terms – they simply overrode them, ordering petitioners to assume their former insured's liability in the first instance, including potentially millions of dollars in liability to residents of property they never insured.

The ruling is irreconcilable with multiple precedents of this Court and others.

A. This Court's Precedents Prohibit Naked Retroactive Wealth Transfers

This Court has long held that the Constitution's most basic guarantee of due process denies Government the power to "take[] property from A. and give[] it to B," *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.), without a legitimate public purpose and lawful justification. Numerous provisions of the Constitution secure this right as against legislative or regulatory action. The Takings Clause prohibits Government from taking property for non-public uses and without providing just compensation. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003). The Contracts Clause will invalidate legislation that "nullifies express terms of [a] company's contractual obligations and imposes a completely unexpected liability," especially when those obligations are "in an area where the element of reliance [is] vital." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246-47 (1978). And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit statutes imposing severe, unexpected monetary liabilities on parties for past conduct. *See E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring); *id.* at 557 (Breyer, J., dissenting).

Although neither the Takings Clause nor the Contract Clause applies expressly to judicial action, the Due Process Clauses clearly do, and they necessarily impose limits on courts akin to the restrictions on legislative action embodied in other provisions. As the Court has explained in the criminal context, "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing [a retroactive criminal] law, it

must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). Under this principle, "a judicial alteration of a common law doctrine . . . violates the principle of fair warning, and hence must not be given retroactive effect . . . where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (quoting *Bouie*, 378 U.S. at 354). The same rule clearly must apply in civil cases as well – the Due Process Clause is concerned equally with liberty and with property, and in both the criminal and civil contexts there is a "crucial difference between simply applying a law to a new set of circumstances and changing the law that has previously been applied to the very circumstances before the court." *Id.* at 471 (Scalia, J., dissenting); *cf. Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (invalidating state-law judicial ruling in civil case under Article II standard "parallel" to *Bouie* due process standard).

B. The Decision Below Authorizes Unjustified And Unjustifiable Retroactive Wealth Transfers, In Conflict With This Court's Precedents

The decision below cannot be reconciled with the Court's precedents prohibiting naked, retroactive wealth transfers. When each petitioner issued its policy to HANO, it agreed that upon the happening of a particular enumerated offense, within a particular time period, it would pay out a certain sum of money. Under the state court's "all sums" ruling,

however, when an insurer issues a policy in Louisiana, it exposes itself to liability for which it never contracted and could not have anticipated. That ruling is utterly without plausible justification – indeed, the Court of Appeal did not even purport to offer a justification. And of course petitioners had no warning whatsoever when they issued their insurance policies that their terms could be rewritten by an unexplained and unsupported judicial decision. The decision below is thus wholly "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354; *see Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) ("notice" or "fair warning" is the "analytic touchstone" of due process analysis); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("foreseeability" is "critical to due process analysis").

It is difficult to imagine a modern judicial ruling more unexpected that the decision below. Indeed, the "all sums" ruling of the Louisiana Court of Appeal for damages outside the policies' terms of coverage is *contrary* to the applicable state law. Louisiana's Direct Action Statute, which is the entire basis for making the insurers parties to this case in the first place, provides that a person injured by an insured entity "shall have a right of direct action against the insurer *within the terms and limits of the policy*." La. Rev. Stat. § 22:655(B) (emphasis added); *see Pareti v. Sentry Indem. Co.*, 536 So. 2d 417, 421 (La. 1988) ("Policy provisions which limit the insurer's liability or place restrictions on policy obligations should be enforced unless they conflict with statutes or public policy."). Yet the decision below

expressly awards plaintiffs damages directly from the insurers "that fall outside of their terms of coverage." App. 29a. That ruling certainly was unexpected, as would be any 180-degree contradiction of existing statutory law.

Nor is the court's action defensible. This case is not an instance of a court applying a regulation that limits an individual's use of his property, *cf. Block v. Hirsh*, 256 U.S. 135, 157-58 (1921); or approving a tax law, *cf. United States v. Carlton*, 512 U.S. 26, 33 (1994); or construing a contract against a party's interest, *cf. Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117-18 (1923). This is not a court applying a preexisting contract-law rule, such as unconscionability or *contra proferentum*, to a new set of facts, "reevaluating and refining [doctrines] as may be necessary to bring the common law into conformity with logic and common sense." *Rogers*, 532 U.S. at 461-62. Nor is this an instance of a court interpreting an ambiguous contract term against the drafter; to the contrary, the court expressly acknowledged that the award fell "outside [the] terms of coverage" of the insurance policies. This is instead a blatant confiscation of insurer assets without any basis in existing law – as demonstrated by the court's failure to invoke any existing doctrine or precedent supporting its confiscatory ruling.

Insurance policies obviously cannot be priced if their coverage terms – including their limitations – cannot be enforced. But now they are virtually without meaning in Louisiana. What matters now is not what the insurance policy says, but whether the insured was held liable to an assertedly injured party (which defines the scope of the insurer's pri-

mary obligation), and whether the insurer eventually can recover in contribution from the insured or other parties the amounts that the insurer was forced to pay for damages that were outside its policy's coverage terms (which defines the insurer's ultimate obligation).

It is irrelevant that the Court of Appeal granted the insurers a right to pursue "contribution" from the other defendants for amounts "that fall outside their terms of coverage." A "right to contribution is an incident of . . . joint liability," *Erie R.R. v. Erie & W. Transp. Co.*, 204 U.S. 220, 225 (1907) (Holmes, J.), and there was nothing here on which to predicate joint liability: each policy "is between the companies. No other person is a party. The promises are between them severally. Each binds itself to [the other]. There is no joint undertaking or promise . . . to any one else. . . . [There is thus] no doubt as to the intention of the parties in regard to the limit of their several liabilities as between themselves." *Adriatic Fire Ins. Co. v. Treadwell*, 108 U.S. 361, 365 (1883). The Louisiana court did not suggest otherwise. It simply decided, for the first time, to treat an insurance contract as wrongdoing equivalent to the tort itself, the agreement limiting the amount of "injury" attributable to the insurer but creating a joint liability relationship. The holding is wholly without basis in law.[10]

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[10] It bears noting that the right of contribution also provides no practical comfort that petitioners will recover the non-contractual sums, given that many of their co-defendants have few assets or are constrained by statute in their ability to sat-

C. The Decision Below Contradicts Decisions Of Numerous State Supreme Courts Holding That Insurer Liabilities Are Limited By The Policy Terms

Insurance law may generally be a complicated area of state law, but there is one universally accepted principle, rooted in basic constitutional protections against naked retroactive wealth transfers: "[T]he court must enforce the [insurance] contract as the parties have made it and may not . . . remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 172 S.E.2d 518, 522 (N.C. 1970); *see Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 353 (Cal. 2003) (courts "do not rewrite any provision of any contract, including an insurance policy, for any purpose" (alterations omitted)); *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 787-88 (Mich. 2003) ("[T]he parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority of the courts to interfere with the parties' agreement. Respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties." (footnote and citations omitted)); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 533 S.E.2d 597, 601 (S.C. Ct. App. 2000) ("An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction."); *Medlar v. Aetna Ins. Co.*, 248 A.2d 740, 747

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isfy judgments. *See, e.g.*, La. Rev. Stat. § 40:405; La. Rev. Stat. § 13:5109(B)(2).

(Vt. 1968) ("It is the duty of the courts to construe contracts, not make them [for the parties], and courts can only enforce agreements as written and are without authority to rewrite contracts, even insurance contracts.").[11] While this rule has been recognized by too many courts to name comprehensively, its existence and merit have not been questioned anywhere to petitioners' knowledge.

Until now. The decision below does not explain its departure from the broad consensus, nor does (or could) it justify its outcome as within any current understanding of insurance or black-letter contract law. Instead the decision simply adopts and applies a new rule of Louisiana law, under which a court may "impose liability upon the [insurance] company which it did not assume and for which the policyholder did not pay." *Wachovia*, 172 S.E.2d at 522. That holding cannot be reconciled with the fundamental, due-process-based protections every other state jurisdiction affords to contracting parties, including parties to insurance contracts: their bargain will be respected, absent violation of a statute or a recognized common-law rule precluding enforcement of the agreement. Neither is present here.

* * * *

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[11] *See also Hardee v. Hardee*, 585 S.E.2d 501, 503 (S.C. 2003); *Elliott v. Darwin Neibur Farms*, 69 P.3d 1035, 1040 (Idaho 2003); *Yarcheski v. Reiner*, 669 N.W.2d 487, 495 (S.D. 2003); *Alpine Haven Prop. Owners Ass'n v. Deptula*, 830 A.2d 78, 86 (Vt. 2003); *Standard Banner Coal Corp. v. Rapoca Energy Co.*, 576 S.E.2d 435, 437 (Va. 2003); *Heitz v. Clovis*, 578 S.E.2d 391, 395 (W. Va. 2003); *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 783 (Wis. 2003); *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 948 P.2d 909 (Cal. 1997).

Imagine the decision below enacted as a statute by the Louisiana legislature:

> *Section One.* Existing insurance agreements will now cover *all* damage liabilities incurred by insureds, notwithstanding any coverage terms set forth in the policies.
>
> *Section Two.* Insurers may pursue contribution from insureds or other parties for damages amounts paid under Section One outside the coverage terms of the policies.

Presumably no court would hesitate to declare that statute an unconstitutional retroactive transfer of wealth from insurers to insureds, or to those to whom insureds are judgment-debtors. Yet the decision below directs precisely that result, putting itself, and Louisiana insurance law generally, into conflict with long-settled decisions of this Court and others. Certiorari should be granted.

II. THE DECISION BELOW ASSESSES INDIVIDUAL ACTUAL LOSSES SOLELY ON THE BASIS OF NONINDIVIDUAL, CLASSWIDE FORMULAS, IN CONFLICT WITH DECISIONS OF NUMEROUS FEDERAL CIRCUITS

Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001). They are, like any other element of a plaintiff's claim, subject to proof: the "amount awarded varies in accordance with the nature and extent of the damages for which compensation is made." *Ariz. Copper Co. v. Hammer*, 250 U.S. 400,

426 (1919). The state court in this case, however, assessed damages that bore *no* relationship to "the nature and extent" of each plaintiff's injury. By awarding individual plaintiffs damages without regard to the circumstances of each individual plaintiff's subjective situation, the decision below deprived petitioners the most basic "process" that is "due" to them in a judicial proceeding: the right to fairly contest the claims against them.

A. The Compensatory Damages Awards Below Were Wholly Nonindividualized

The damage award in this case can be broken down into four basic categories: (1) lump amounts for emotional distress awarded according to years of residence; (2) a lump sum of $1,250 for the emotional distress of people who lived nearby; (3) total fair market value in stigma-related property damages for residents of the ASL site; (4) 10% of fair market value in property damages for those who lived nearby. None of those sums bears any relationship to the injury suffered by the particular plaintiff to whom damages were awarded.

Emotional Distress Damages. Emotional distress damages are inherently individualized and "may be awarded only if the plaintiff submits proof of actual injury." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998); *see also Carey v. Piphus*, 435 U.S. 247, 264 (1978) (mental and emotional distress damages require "proof that such injury actually was caused"). The trial and appellate courts below, however, waived the requirement of actual injury. Instead the courts awarded lump sums that simply *assumed* a *fixed* amount of emotional injury

for each person. But it hardly takes sophistication in psychological studies to know that people react differently to events in their lives. And while the courts did try to account for one variable among the plaintiffs – their time of residence – the courts still had no basis for assuming that plaintiffs within the same time categories had the same emotional response. Even the selection of that variable was arbitrary: it makes no more sense to say an individual's emotional distress necessarily varied according to the length of her residence than it would to say it necessarily varied according to the size of her property, or the number of family members she had for whom she might have been concerned. Virtually any variable would have been equally arbitrary, for a simple reason: the emotional distress any given person will experience *depends on the person*.

Nor did the lump sum awards, which the state courts tied to a years-of-residence formula or to where the person lived, have any basis in *fact*. One person's year of knowledge could have caused him $100 in distress, another person's year could have amounted to $1,000 worth. One nearby resident might have suffered $500 in emotional distress, another nearby resident might not have even *learned* about the nearby contamination. Again, it is impossible to say without developing an evidentiary record for the particular plaintiff.

Property Damages. The state court's approach to damages for lost property value is no less problematic. An across-the-board determination that properties are worthless makes no sense unless there is some evidence indicating that, in fact, all the properties are indeed worthless. Not only is that assump-

tion factually unsupported here, it is actually contrary to the undisputed record: plaintiffs' own expert testified that the five homes he examined had suffered stigma-related depreciation ranging from 17% to 35%, and some plaintiffs sold property on the ASL site for more than fair market value. But the courts' damages judgment assumed 100% diminution in value – a figure that bears no connection to the record evidence. The court's award of 10% in lost property value for adjacent-area residents is similarly irrational – *nothing* in the record even suggested that adjacent residents suffered such a categorical diminution in property value.

B. The Court Of Appeal's Holding That Individual Damages May be Determined On A Nonindividuated Basis Conflicts With Decisions Of Numerous Federal Circuits

This Court recently reiterated that state courts cannot impose monetary punishment on "an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). The Due Process Clause guarantees defendants a "right to litigate the issues raised," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) – a right that applies to issues of damages no less than it does to issues of liability. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (due process guarantees each litigant the "opportunity to present his case and have its merits fairly judged"); *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913) ("All parties must be fully apprised of the evidence submitted or to be considered, and must be

given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding . . . ."); *accord Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-04 (1963).

A defendant's basic due process right to contest each and every claim presented in a judicial proceeding necessarily applies to the determination of compensatory damages. "Compensatory damages for emotional distress and other intangible injuries are not presumed from the mere violation of constitutional or statutory rights, but require specific individualized proof, including how each Plaintiff was personally affected . . . and the nature and extent of the harm." *Decorte v. Jordan*, 497 F.3d 433, 442 (5th Cir. 2007). Accordingly, the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, and other state courts, have held that when compensatory damages "implicate[] the subjective differences of each plaintiff's circumstances," they "may be awarded only if the plaintiff submits proof of actual injury." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998); *see Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("A class-action claim for monetary relief may present common questions of liability, but, because the goal of the damage phase is to compensate the *plaintiffs* for their *individual injuries*, the claim will generally require the court to conduct individual hearings to determine the particular amount of damages to which each plaintiff is entitled."); *Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst.*, 435 F.3d 639,

650 (6th Cir. 2005) (following *Allison*); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004) (in a class action, some issues, "such as assessment of damages for each [plaintiff], must be handled individually"); *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (commonality of injury "begins to break down when the class seeks to recover . . . monetary relief to be allocated based on individual injuries" (quoting *Allison*, 151 F.3d at 413)), *overruled in other part on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006); *Barabin v. Aramark Corp.*, 2003 U.S. App. LEXIS 3532, at *5 (3d Cir. 2003) (recognizing that "[w]here monetary relief is requested," "awarding damages normally entails examination of individual claims"); *S.W. Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (class action defendant is "entitled to challenge the credibility of and its responsibility for each personal injury claim individually"); *Rollins, Inc. v. Butland*, 932 So. 2d 1172, 1185 (Fla. Dist. Ct. App. 2006) ("Although a trial court confronting a massive class action may find it tempting to allow proof of 'patterns' and 'common schemes' to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump the class action defendant's right to due process of law"). Applying the requirement of individualized proof when damages are subjective, these precedents all reject class actions on the ground that individualized damages inquiries defeat the predominance of common issues necessary to permit classwide adjudication. *See, e.g., Allison*, 151 F.3d at 416-18; *see also generally Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 342-43 (4th Cir. 1998) (explaining why

"inherently individualized" damages are not amenable to "generalized or class-wide proof").

Other circuits, by contrast, do allow class certification at the threshold liability stage, despite the prospect of individualized damages inquiries later in the case. *See Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Molski v. Gleich*, 318 F.3d 937, 949, 955 (9th Cir. 2003). The Second Circuit, however, has warned that due process may require an individualized analysis at the compensatory damages stage of the case. *See Parker*, 331 F.3d at 22. In "a sufficiently serious case," the Second Circuit explained, invoking due process precedents from this Court, "the due process clause might be invoked . . . to nullify [certification] and reduce the aggregate damage award." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996)). The Ninth Circuit takes the most extreme approach to classwide adjudication of damages issues, holding that even subjective compensatory damages may be recovered on a categorical, classwide basis merely so long as due process protections were afforded for *plaintiffs*. *Molski*, 318 F.3d at 949, 955. While the Second and Ninth Circuits thus disagree over the propriety of classwide compensatory damages determinations when damages vary "depending on the circumstances and merits of each claim," *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 165 (2d Cir. 2001), both circuits agree that the only significant due process risk is to *absent class members* – the rights of defendants to litigate each claimant's actual loss drops out of the picture entirely for both the

Second and Ninth Circuit, just as they did for the Louisiana Court of Appeal in this case.

As the courts on the other side of the divide have understood, that outcome cannot be countenanced in a judicial system that determines rights and liabilities through an adversarial presentation of competing claims and defenses. In this case, for example, by assessing individual damages issues like personal emotional harm and lost property value on a nonindividuated basis, the Louisiana courts deprived petitioners of the opportunity to demonstrate that, for any given claimant, the lump sum or classwide formula *does not correctly determine the existence or amount of that claimant's damages*. As to emotional injuries, some class members may not have been particularly distressed about the contamination, and some may not have even *known* about it. As to property values, the contamination (and EPA's remediation of the area) undoubtedly affected different class members' property differently; the testimony at trial in fact demonstrated that it *did* have a variable effect.

The point is that *both* plaintiffs *and* defendants have due process rights to contest claims and defenses, especially on such central issues as the existence and extent of actual damage. Because the damages to which each class member is entitled will necessarily depend on his or her individual circumstances, it is impossible to fairly determine damages by ignoring those individual circumstances and prohibiting the defendants from examining the same. To award individual damages according to a nonindividuated, classwide formula is to deny defendants

the most basic "process" that is "due" in an adversarial justice system.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

MARY S. JOHNSON
JOHNSON GRAY
MCNAMARA, LLC
21357 Marion Lane
Suite 300
Mandeville, Louisiana 70471
(985) 246-6544

JONATHAN D. HACKER
(*Counsel of Record*)
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

JAMES M. GARNER
SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.
909 Poydras Street
28th Floor
New Orleans, Louisiana 70112
(504) 299-2100

JAMES MARTIN
COHN BAUGHMAN
& MARTIN
333 West Wacker Drive
Suite 900
Chicago, Illinois 60606
(312) 753-6600

RICHARD W. BRYAN
JACKSON & CAMPBELL, P.C.
1120 20th Street, N.W.
South Tower
Washington, D.C. 20036
(202) 457-1638

Counsel for Petitioners

APPENDIX A

JOHN JOHNSON, ET AL.	*	NO. 2006-CA-1223
VERSUS	*	COURT OF APPEAL
ORLEANS PARISH SCHOOL BOARD, ET AL.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 93-14333, DIVISION "J-13"
HONORABLE NADINE M. RAMSEY, JUDGE

* * * * * * *

JAMES F. MCKAY III
JUDGE

* * * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge David S. Gorbaty, Judge Edwin A. Lombard, Judge Leon A. Cannizzaro, Jr.)

CANNIZZARO, J., DISSENTS IN PART WITH REASONS

LINDA S. HARANG
LAW OFFICES OF LINDA S. HARANG, L.L.C.
Jefferson, Louisiana 70123-8518
-and-
SUZETTE BAGNERIS

BAGNERIS LAW FIRM, L.L.C.
New Orleans, Louisiana 70114-4025
-and-
STEPHEN B. MURRAY
MURRAY LAW FIRM
New Orleans, Louisiana 70130
-and-
GEORGE J. G. ROUX
New Orleans, Louisiana 70130
-and-
JOSEPH M. BRUNO
BRUNO & BRUNO
New Orleans, Louisiana 70113-1102
Counsel for Plaintiffs/Appellees

EVELYN F. PUGH
CHIEF DEPUTY CITY ATTORNEY CITY OF NEW ORLEANS
EDWARD R. WASHINGTON III
DEPUTY CITY ATTORNEY CITY OF NEW ORLEANS
PENYA MOSES-FIELDS
CITY ATTORNEY CITY OF NEW ORLEANS
New Orleans, Louisiana 70112
Counsel for Defendant/Appellant, City of New Orleans

ROY J. RODNEY, JR.
JOHN K. ETTER
RODNEY & ETTER, LLC
New Orleans, Louisiana 70119
Counsel for Defendant/Appellant, Housing Authority of New Orleans

NANNETTE V. JOLIVETTE
DOUGLAS L. GRUNDMEYER

JONATHAN C. MCCALL
CHAFFE McCALL, L.L.P.
New Orleans, Louisiana 70163-2300
Counsel for Defendant/Appellant, Orleans Parish School Board

MARY S. JOHNSON
JILL T. LOSCH
JOHNSON GRAY MCNAMARA, LLC
Covington, Louisiana 70433
-and-
MARSHALL J. SIMIEN, JR.
THE SIMIEN LAW FIRM
Lake Charles, Louisiana 70629
-and-
RICHARD W. BRYAN
JACKSON & CAMPBELL
Washington, DC 20036
Counsel for Defendant/Appellant, National Union Fire Insurance Company of Pittsburgh, PA

MATTHEW J. FARLEY
MAURA Z. PELLETERI
AMY M. SELTZER
KREBS, FARLEY & PELLETERI, P.L.L.C.
New Orleans, Louisiana 70130
Counsel for Defendants/Appellants, U.S. Fire Insurance Company and Republic Insurance Company
-and-
LIZBETH J. LEMKE
COHN BAUGHMAN & MARTIN
Chicago, Illinois 60606
Co-Counsel for U.S. Fire Insurance Company

CLAUDE A. GRECO
HAILEY, McNAMARA, HALL, LARMANN & PAPALE, L.L.P.
Metairie, Louisiana 70001
Counsel for Defendant/Appellant, Louisiana Insurance Guaranty Association, as successor to Southern American Insurance Company, in Liquidation

RALPH S. HUBBARD III
CELESTE D. ELLIOTT
LUGENBUHL, WHEATON, PECK, RANKIN & HUBBARD
New Orleans, Louisiana 70130-6027
Amicus Curiae, Complex Insurance Claims Litigation Association

AFFIRMED IN PART AND REVERSED AND RENDERED IN PART

JANUARY 30, 2008

From the early 1900's until approximately 1958, the City of New Orleans leased more than one hundred acres of land in the City's ninth ward for the operation of a municipal landfill and garbage dump. The site, known as the Agriculture Street Landfill (ASL), was bordered by Almonaster Boulevard on the west, Higgins Boulevard on the north, Louisa Street on the east, and the Peoples Avenue Canal and railroad tracks on the south. In 1965, the City reopened the ASL site for the disposal of massive quantities of debris created by Hurricane Betsy.

In 1967, the City and the Housing Authority of New Orleans (HANO) entered into a cooperative agreement for the development of residential properties in the Desire area of the City. Between 1969 and 1971, Drexel Development Corporation constructed the Press Park town homes and apartments for HANO. No remediation or special site preparation was done before Press Park was constructed. In 1971, HANO purchased the completed Press Park project from Drexel and has owned and operated the site since that time. Some Press Park tenants participated in a "turn key" program, whereby a portion of their monthly rent was placed in an escrow account and applied toward the purchase of their town home unit. When their escrow account reached the amount needed for purchase of the unit, HANO transferred title of the unit to the tenant. HANO never advised any of the prospective Press Park tenants or home buyers that the site had once been a part of the City's landfill.

In the late 1970s, the City performed soil testing in the Gordon Plaza area of the ASL neighborhood, in anticipation of the construction of the Gordon Plaza single-family homes. As a result of the soil testing, the City required the developers of Gordon Plaza to add topsoil before constructing the homes. In 1980, sixty-seven family homes comprising Gordon Plaza were built. The Gordon Plaza home buyers were not told that their homes were located on what had once been a part of the City's landfill.

In 1975, the Orleans Parish School Board (School Board) purchased a tract of land along Abundance Street in the ASL neighborhood, with the intent to build an elementary school. In 1984, the School Board began plans for construction of Moton Ele-

mentary School on the site. Because the School Board knew when it purchased the property that the site had once been a part of the City's landfill, the School Board hired engineering firms to conduct an environmental evaluation of the property. Environmental testing on the site identified the presence of numerous toxic and hazardous materials, including lead, arsenic, mercury, and polycyclic aromatic hydrocarbons. Because of the presence of the toxic and hazardous materials, the School Board hired several environmental consultants to advise them on how the site could be remediated to eliminate the danger of harmful exposures created by the presence of hazardous materials. The environmental consultants recommended that the entire site be excavated to a depth of three feet, with the top three feet of contaminated soil removed and replaced with two feet of clean topsoil. Between the clean topsoil and the hazardous materials, the consultants recommended that a layer of six inches to one foot of impermeable clay be placed over the entire site. In 1986-87, Moton Elementary School opened for kindergarten through sixth grade with an enrollment of approximately nine hundred students. The School Board did not tell its employees or the parents of the students that the school had been built on a part of the City's former landfill or that environmental testing had identified the presence of toxic materials on the site. During the 1991-92 school-year, there were plumbing problems at Moton Elementary which required under-slab construction and repairs. This necessitated the construction of a trench and the breach of the three-foot layer of clean topsoil.

The Environmental Protection Agency (EPA) tested the soil in parts of the ASL neighborhood in

1986 to determine whether the ASL site was contaminated. The residents were not given the results of the EPA's 1986 soil tests nor were they told that their property was contaminated or given any special instructions to follow or precautions to take to protect themselves from exposures to the soil. Between 1985 and 1986, the Louisiana Department of Health and the Agency for Toxic Substance Disease Registry (ATSDR) conducted a public health screening of children in the ASL neighborhood to determine whether there was an increased incidence of elevated blood lead levels. The residents were never told that their children had been exposed to excess levels of lead, nor were they given any special instructions or precautions to follow to protect their children from exposures to the soil.

In 1993, the EPA came back to the ASL site and conducted more soil tests throughout the neighborhood. The tests indicated that the soil was contaminated with more than one hundred forty toxic and hazardous materials, more than forty of which are known to cause cancer in humans. The EPA told the ASL residents to take special precautions to protect themselves from any exposure to the soil. In 1994, the EPA placed a portion of the ASL neighborhood on the National Priorities List and later that same year it declared that the ASL site was sufficiently contaminated to be named a Superfund site. Later that same year, the School Board closed the Moton Elementary School campus and the ASL residents formed the Concerned Citizens of the Agriculture Street Landfill, Inc. to qualify for federal grant funding to pay for the services of an environmental technical advisor.

In the mid-1990s, the EPA proposed a remediation plan for the ASL site that would remove and replace the top two feet of soil, where possible, with a semipermeable barrier between the clean topsoil and the contaminated soil. The soil under buildings and the streets would not be disturbed. The ASL residents opposed the EPA's plan as being inadequate to remediate the site. The ASL residents supported an alternative voluntary relocation/buy-out plan. The EPA rejected the requests of the ASL residents and from 2000-2001, the EPA financed a $20,000,000.00 remediation project. In the remediation process, approximately two feet of soil was removed from around houses and buildings where possible. Due to underground utilities, water lines, etc., only one foot of soil was removed in some areas. After the EPA completed the remediation work, the ASL residents were given a certificate of completion confirming that their property had been partially remediated. The EPA also gave the ASL residents a list of permanent restrictions on the use of their property and advised the ASL residents that they were responsible for maintaining the integrity of the clean layer of topsoil and the felt-like material that comprises the semi-permeable barrier between the clean layer of topsoil and the ground below.

Not satisfied with the steps taken to correct the problems with the ASL neighborhood, a number of the residents proceeded with a class action lawsuit.[1]

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[1] More factual and procedural history on this litigation may be found in Johnson v. Orleans Parish Sch. Bd., 2000-0825, 2000-0826, 2000-0827, 2000-0828 (La.App. 4 Cir. 6/27/01), 790 So.2d 734, writ denied, 2001-2215, 2001-2216, 2001-2225 (La. 11/9/01), 801 So.2d 378; Johnson v. Orleans Parish Sch. Bd., 2003-0828 (La.App. 4 Cir. 11/3/04), 890 So.2d 579; Johnson v.

The named defendants in the action include the City, HANO, the School Board, and HANO's insurers, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, U.S. Fire Insurance Company, Republic Insurance Company, and South American Insurance Company/Louisiana Insurance Guaranty Association. The plaintiff class has previously been defined as follows: 1) current and former residents who have lived on the site of the former landfill, as defined as the area bounded on the north by Higgins Blvd., on the east by Louisa Street, on the south by Florida Avenue and on the west by Almonaster Avenue and the Peoples Avenue Canal, for at least twelve months prior to February 1, 1994; 2) current and former business owners and their employees who have operated a business on the former landfill site, as described above, for at least twelve months prior to February 1, 1994; 3) current residents who are the owners of record of their homes, or who are buying their homes but have not yet completed their payments; and 4) former students and employees of Moton Elementary School who attended or worked at the school on the site of the former landfill for at least twelve months or one school year prior to February 1, 1994.

In the instant case, a bench trial began on January 7, 2005 and ended on March 11, 2005. On January 12, 2006, the trial court entered judgment in favor of the plaintiff class and against the defendants. The trial court made the following findings and rul-

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Orleans Parish Sch. Bd., 2004-1352 (La.App. 4 Cir. 2/16/05), 897 So.2d 812; Johnson v. Orleans Parish Sch. Bd., 2005-0796 (La.App. 4 Cir. 3/22/06), 929 So.2d 761; and Johnson v. Orleans Parish Sch. Bd., 2005-1488 (La.App. 4 Cir. 8/9/06), 938 So.2d 219.

ings. The trial court found that the class members' claims were timely filed August 31, 1993 and were not prescribed. The trial court also found that neither the City, HANO, or the School Board met their burden of proving the defense of "discretionary function" immunity. The trial court dismissed the School Board's cross claim against the City under the Hazardous Waste Cleanup Law. The trial court also dismissed the School Board's third party claims against HANO for stigma defenses and diminution of property value. The trial court found the City (50%), HANO (50%) and their insurers liable jointly and *in solido* to the members of the first three sub-classes. The trial court found the School Board and its insurers liable to the members of the fourth group.

Property owners on the actual site were awarded their fair market property values and those in the adjacent area were awarded 10% of their property value for stigma damages. For emotional distress, those who lived on the site were awarded $4,000 per year for 1 to 5 years, $25,000 for 5 to 10 years, $30,000 for 10 to 15 years, $40,000 for 15 to 20 years, and $50,000 for 20 years or more. Those who lived in the adjacent area were entitled to $2,500 in emotional distress. Students and workers at Moton Elementary were awarded $2,000 per year. The following members of the first three sub-classes were awarded the following amounts: Phyllis Mineva George Smith ($72,000), Don Harrison Lewis, Sr. ($155,000), Nathan Parker ($145,000), Viola Naomi Washington Allen ($140,000), Peggy Williams Grandpre ($63,500), Lizette Gaines Watson ($7,000), Fannie Lee Johnson ($50,000), Iris Russell Myers ($2,500), Diarra Ayodele McCormick ($40,000); the

school board is jointly liable in the amount of $12,000 for the time Diarra was a student at Moton.

For Groups 1, 2, and 3 of the class the trial court assigned both the city 50% virile share of liability and HANO and its insurers (according to their years of coverage) 50% share virile liability. The school board was assigned 100% of the liability for group 4.

The trial court found that none of the plaintiffs were contributorily negligent.

The trial court found that the city was negligent in its actions and inactions that resulted in the conversion of its own former municipal landfill into a residential area that the EPA deemed unreasonably dangerous in 1994. This finding was based on Civil Code Article 2315 as it existed prior to 1980. HANO was found negligent under Civil Code Article 2317 as it existed prior to 1980. HANO's insurers were also liable to the plaintiffs for their physical and emotional damages. It is from this judgment that the defendants now appeal.

DISCUSSION

The defendants all essentially argue that the trial court erred in not employing a *de novo* review; not finding that the plaintiffs' claims had prescribed; not finding that the defendants were protected from liability by the discretionary immunity function; finding that the defendants were solidarily liable; applying current environmental laws and regulations retroactively and finding that property within the class boundaries was and still is unreasonably dangerous. The defendants also argue that the trial court erred in awarding damages for diminution of property value and emotional distress. The School Board also argues that it is not liable for acts of its independent

contractors and the School Board itself is a member of the class. Finally, the various insurers argue that the 'trial court erred in finding that their respective policies provided coverage for the plaintiffs' claims against HANO.

Standard of Review

Factual findings of the jury are reviewed using the "manifest error" or "clearly wrong" standard. Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989). Reviewing and reversing the factfinder's determinations involves a two-part test developed by the Louisiana Supreme Court. Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). This test requires the reviewing court to find that no reasonable factual basis exists for the trial court's findings and that the findings are wrong or "manifestly erroneous" according to the record. Id. The record must be reviewed in toto to discern whether the factfinder was clearly wrong. Stobart v. State, Through Dept. of Transp. and Dev., 617 So.2d 880, 882 (La. 1993). The trial court has a "better capacity to evaluate live witnesses." Canter v. Koehring Co., 283 So.2d 716, 724 (La. 1973). Therefore, "the appellate court must determine if the factfinder's decision was a reasonable one." Norfleet v. Lifeguard Transp. Serv., Inc., 2005-0501 (La.App. 4 Cir. 5/17/06), 934 So.2d 846, 852. "[W]here two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." Stobart, 617 So.2d at 883.

Appellate courts review legal errors with a *de novo* standard. Overton v. Shell Oil Co., 2005-1001 (La.App. 4 Cir. 7/19/06), 937 So.2d 404, 410.

In the instant case, the defendants contend that *de novo* review of the trial court's factual findings and legal conclusions is required because the trial court committed legal errors. The defendants' contention, however, is wrong. The bases for this appeal are all questions of fact. When the actual basis for an appeal is a question of fact, the trial court's findings of fact are to be given great discretion and are to be reversed only where there is manifest error.

Regarding damages, the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. Youn v. Maritime Overseas Corp., 623 So.2d 1257 (La. 1993).

Prescription

The trial court found that the class members' claims were filed on August 1, 1993 and had not prescribed. The defendants contend that the trial court disregarded the evidence to hold that plaintiffs' claims against them were not prescribed and impermissibly shifted the burden of proof on prescription to the defendants. The trial court summarized its views on the prescription question as follows:

> From 1984 through 1993 the residents were told by various governmental agencies, Department of Environmental Quality

("DEQ"), the Louisiana Department of Health, and the School Board that their neighborhood was safe. During this same period of time, the City and HANO were publicly silent. In fact, the City and HANO claim they had no knowledge until 1993 that the property was contaminated.

The Court also finds that the Defendants should not benefit from their own silence. During the same period of time, the Defendants claim they knew nothing about the contaminated condition of the soil or the hazardous materials to which the plaintiffs were being exposed on a daily basis. Nevertheless, the Defendants claim that somehow the Plaintiffs, who are ordinary citizens with no special education or scientific training should have been able to acquire knowledge superior to that of the City, HANO, the School Board, The Louisiana Department of Health, DEQ, ATSDR, and the EPA.

Louisiana courts have long recognized that prescription does not run against one unable to act, which is based on the ancient civilian doctrine of *contra non valentem agree nulla currit praescripto.* Hendrick v. ABC Ins. Co., 2000-2403, 2000-2349 (La. 5/15/01), 787 So.2d 283, 289. In such case, the prescriptive period begins to run on the date that the injured party discovered or should have discovered the existence of facts that would entitle him to bring suit. Doskey v. Hebert, 93-1564 (La.App. 4 Cir. 9/29/94), 645 So.2d 674, 679 *citing* Cartwright v. Chrysler Corp., 232 So.2d 285 (La. 1970). There are four categories of situations where Louisiana courts have applied the doctrine of *contra non valentem* to

prevent the accrual of liberative prescription: (1) where there is some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiffs' action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. Id.

The first three of these categories do not apply in the instant case. However, the fourth category does apply. The fourth category, commonly known as the discovery rule, provides that prescription does not run against one who is ignorant of the facts upon which his cause of action is based, as long as such ignorance is not willful, negligent or unreasonable. Id. Based on the record before this Court, there is nothing to indicate that the plaintiffs in the instant case knew or should have known who to file suit against or what to file suit for before August of 1993. We must also be mindful of the fact that the City, HANO, and the School Board all operated as if everything was alright with the ASL site during the time period leading up to the plaintiffs' filing suit. If we are to assume that these defendants, who were in a superior position as to know what was going on, were not overly concerned about any potential harm or injury to the plaintiffs, we must assume the same for the plaintiffs. As such, we find no error in the trial court's finding that the plaintiffs' claims had not prescribed.

Applicable Law

Being that we have determined that the plaintiffs' claims against the defendants have not prescribed, we must now explore whether the trial court applied the correct law in this case. To decide whether a claim is prescribed, a court looks to the time when a plaintiff knew or should have known that a cause of action arose or existed. However, to decide what substantive law to apply, a court must look to when the cause of action accrued, *i.e.* when the injury or insult to the plaintiff first occurred. Cole v. Celotex, 599 So.2d 1058 (La. 1992); Austin v. Abney Mills, Inc., 2001-1598 (La. 9/4/02), 842 So.2d 1137. For a negligence cause of action to accrue, three elements are required: (1) fault; (2) causation; and (3) damages. A cause of action may accrue before a plaintiff sustains or is even aware of all the damages occasioned by the defendant's negligence. Id.

In the instant case, the trial court determined that the City and HANO are liable for their conduct beginning in 1968-69 when they entered into a "Co-operative Agreement" to develop low-income housing in the ASL neighborhood. Both the City and HANO knew that the Press Park site had once been a municipal landfill, but neither took any steps to cover the site with any protective layer of soil. Based on the principle set out in Cole v. Celotex and its progeny, Austin v. Abney Mills, the trial court found that the pre-1987 law of negligence, strict liability, premises liability, comparative fault, and solidary liability is the law of this case. Both Cole and Abney Mills involved claims pertaining to a latent disease that manifests only after many successive years of almost daily occupational asbestos exposure. Both cases

stand for the proposition that when significant acts of negligence giving rise to the plaintiff's damages occur many years before all of the damages are known or suffered, then the law that applies to the claim is the law that was in effect when the significant negligent acts occurred. Likewise, the trial court believed that negligent acts perpetrated by the City and HANO in the instant case were akin to the negligent acts of the defendants in Cole and Abney Mills and that their exposures to the former landfill were of a similar nature to the plaintiffs' exposures to asbestos in Cole and Abney Mills. The City's and HANO's negligent acts occurred before the laws on negligence, strict liability, premises liability, comparative fault, and solitary liability changed. The trial court held that the plaintiffs' causes of action against the City "accrued" in 1968-69 and their causes of action "arose" in 1993. The trial court also found that the City and HANO were liable jointly and *in solido*. As such, we find no error in the trial court's application of the pre-1980 law to the conduct of the City and HANO.

The trial court determined that the School Board was liable for its conduct in 1984-85 when the school was under construction. The School Board ignored its consultants' advice to install a layer of clay beneath the clean dirt that was brought to the site. The School Board also failed to advise its contractor and subcontractors that the site was contaminated and that the dirt being removed from the site was contaminated and had to be disposed of under applicable state and federal regulations. As such, the trial court found that the school site was defective under Civil Code articles 2317 and 2322 as they existed prior to 1987. Being that the School Board's

conduct took place in 1984-85, we employ the same rationale discussed immediately prior in finding that the trial court did not err in applying the pre-1987 substantive law to the School Board.

Discretionary Function Immunity

The defendants contend that the trial court's finding that their conduct was not protected by discretionary function immunity was based on overturned jurisprudence and was not based on the evidence presented.

La. R.S. 9:2798.1 (B) & (C) provide:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy making or discretionary acts when such acts within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable: (1) to acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or (2) to acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

Based on this statute, the defendants contend that even if they are negligent, they are nevertheless shielded from tort liability to the class under the principle of "discretionary function" immunity. The

trial court found that the defendants did not meet their burden of proof on this affirmative defense.

The Louisiana Supreme Court established a two-step test for courts to follow when determining whether the immunity applies. *See* Simeon v. Doe, 618 So.2d 848, 852-53 (La. 1993). A court must first determine whether a statute, regulation, or policy requires the governmental agency to follow a particular course of action. If there is such a requirement, then there is no choice or discretion, and the immunity does not apply. If, however, the governmental entity has a choice about whether to undertake the activity, then the entity will be protected by the immunity only if the choice is grounded in "social, economic, or political policy." Id. The application of this affirmative defense is "a question of fact to be determined through a trial." Lambert v. Riverboat Gaming Enforcement Div., 96-1856 (La.App. 1 Cir. 12/29/97), 706 So.2d 172, 178. Once a defendant establishes its conduct involves a matter of choice or discretion that is not the end of the inquiry. A court must also consider whether the conduct in question occurred at the "operational level", or how the entity carried out its policy or decision. The immunity statute does not protect governmental entities against legal fault or negligent conduct at the "operational level", but only confers immunity for policy decisions, that is decisions based on social, economic, or political concerns. Chaney v. National Railroad Passenger Corp., 583 So.2d 926, 929 (La.App. 1 Cir. 1991). As such, once a discretionary decision is made, the government entity is not protected from liability for conduct in carrying out the discretionary decision. Socorro v. Orleans Levee Bd., 561 So.2d 739, 756 (La.App. 4 Cir. 1990).

In the instant case, the defendants raised the "discretionary function" immunity as an affirmative defense in their answers and pleadings. As such, the defendants had the burden of proof on this affirmative defense. It must be proved by a preponderance of the evidence. Abadie v. Markey, 97-684 (La.App. 5 Cir. 3/11/98), 710 So.2d 327, 332. Accordingly, the defendants had to prove at trial that their actions were "grounded in social, economic, or political policy." The City's and HANO's decision to provide the service of low income housing was certainly an act of discretion, as was the School Board's decision to build Moton Elementary School. However, every subsequent decision that the defendants made were of an operational nature. The failure to conduct an adequate investigation into the environmental conditions at the site, the failure to undertake proper remediation work at the site, and the failure to warn residents of the potential dangers associated with the site were all operational failures. In its reasons for judgment, the trial court correctly points out that "the defendants continually fail to comprehend that it was their failure to make easonable operational decisions that subject them to liability." We find no error in the trial court's finding that the defendants' conduct was not protected by discretionary function immunity.

Environmental Laws and Regulations

The defendants contend that the trial court erred by retroactively applying current environmental laws and regulations, resulting in the court erroneously finding the defendants liable. The defendants also contend that the trial court failed to recognize that claims challenging the environmental protection agency and the Louisiana Department of Envi-

ronmental Quality's decisions about the neighborhood were precluded under supremacy and separation of powers principles. The plaintiffs contend that there is a difference between a regulatory ruling and scientific or medical reality.

Investigations throughout Press Park in 1993-94 determined that there was an extremely high level of lead at the surface. The EPA authorized a twenty million dollar partial remediation of the upper one to two feet of soil in parts of Press Park (no soil was removed beneath any buildings or streets) in order to remove in the EPA's words, the "immediate health threat." No environmental specialist has said that Press Park is now clean. No environmental specialist has said that Press Park poses no future risk of harm to the residents. In fact, the EPA has identified 149 contaminants in the Press Park soil and the only barrier between the contaminated soil and the new clean soil is a semi-permeable barrier that will not prevent the upward migration of the contaminants. In her report to the School Board in 1985, Dr. Verna Campbell stated that although the health effects for the specific toxins at the site are known, the lowest level at which the adverse health effects can occur is not known. Dr. Campbell also reminded the School Board that for the 49 known carcinogenic materials, "the scientific literature makes it clear that no known safe level has been identified below which exposure can be assured not to result in cancer in some of the exposed population. Accordingly, we agree with the trial court's assessment that a regulatory standard and a guarantee of safety are not synonymous. Based on the evidence that was before the trial court, this is a reasonable conclusion and as

such we may not reverse this finding unless it is clearly wrong or manifestly erroneous.

Damages

We find no error in the trial court's awarding of damages for diminution of property values. There is objective evidence in the record to make such a finding reasonable.

The trial court's awarding of damages for emotional distress, however, is more problematic. The correct standard for the recovery of negligent infliction of emotional distress absent physical injury is that the plaintiff must show an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Moresi v. State Through Dep't of Wildlife and Fisheries, 567 So.2d 1081, 1096 (La. 1990); Bonnette v. Conoco, Inc., 2001-2767 (La. 1/28/03), 837 So.2d 1219. Louisiana courts have also recognized that plaintiffs, without regard to physical injury, may recover for emotional distress and inconvenience resulting from damage to their property, but only in the following categories of cases: (1) when the property was damaged by an intentional or illegal act; (2) when the property was damaged by acts giving rise to strict or absolute liability; (3) when the property was damaged by activities amounting to a continuous nuisance; and (4) under circumstances where the owner was present or nearby at the time the damage occurred and suffered psychic trauma in the nature of or similar to a physical injury as a direct result of the injury itself. Frank L. Maraist and Thomas C. Galligan, Jr., *Louisiana Tort Law* § 7.02[6] (2nd ed.2004). The jurisprudence, however, has limited such recovery by re-

quiring that the emotional distress be severe and not merely the result of the usual worry or anxiety attendant to property damage. *See* Farr v. Johnson, 308 So.2d 884 (La.App. 2d Cir. 1975). In Doerr v. Mobil Oil Corp., 2004-1789 (La.App. 4 Cir. 6/14/06), 935 So.2d 231, this Court allowed recovery of damages for emotional distress suffered by plaintiffs that was caused not by the usual worry or anxiety associated with property damage, but legitimate concern about health effects. In Doerr, residents of St. Bernard Parish who suffered no physical injury resulting from contamination of the parish water supply due to oil refinery discharge were entitled to damages for negligent infliction of emotional distress, given that residents had legitimate concerns regarding the health effects of the contamination and took actions such as drinking only bottled water or installing filtration systems and checking the odor and color of the water at each use to test for further contamination. In Doerr, plaintiffs received lump sum damage awards of anywhere from $500 to $2000 while two plaintiffs who had only damages for emotional distress were each awarded only $250.

In order to determine whether the general damages award shocks the conscience, the court should look to the individual circumstances of the case. In re Medical Review Panel Bilello, 621 So.2d 6, 10 (La.App. 4 Cir. 1993). It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1261 (La. 1993). In the instant case, the trial court made its awards of

damages for emotional distress based on the following formula: those who lived on the site were awarded $4000 per year for 1 to 5 years, $25,000 for 5 to 10 years, $30,000 for 10 to 15 years, $40,000 for 15 to 20 years, and $50,000 for 20 years or more. Those who lived in the adjacent area were awarded to $2,500 and students and workers at Moton Elementary were awarded $2,000 per year. Based on the fact that none of the plaintiffs had any physical injuries and considering Doerr, these amounts "shock the conscience." At this point, we would ordinarily resort to an examination of previous awards in other cases to determine the highest or lowest reasonable amount that a reasonable trier of fact could have awarded for negligent infliction of emotional distress, but other than Doerr, there really are no other cases with comparable types of damages, i.e. emotional distress with no physical injuries caused by exposure to a toxic element. *See* Coco v. Winston Industries. Inc., 341 So.2d 332 (La. 1976). Therefore, we must use our own discretion to determine the highest reasonable amount under these particular circumstances that these particular plaintiffs could have been awarded for these particular injuries. The highest amount that would appear reasonable would be around half the amount that the trial court awarded for damages due to emotional distress. Accordingly, we now reduce the trial court's award of damages by 50%.

School Board's Claims

The School Board claims to be a member of the plaintiff class. However, the trial court dismissed the School Board's cross-claims against the City of New Orleans as well as the School Board's third-party claims against HANO. We find no error in

these rulings. The School Board did not prove that either the City or HANO are liable to it or that the City or HANO owe it damages. The School Board exercised its rights to be represented by its own attorneys in bringing these claims and the School Board did not ask for any assistance before, during, or after trial.

The School Board also attempts to resurrect its third-party claims against BFI, CFI, New Orleans Public Belt Railroad, Edward Levy Metals, and others. The trial court correctly dismissed these claims on exceptions of no cause of action. *See* Johnson v. Orleans Parish Sch. Bd., 2003-0828 (La.App. 4 Cir. 11/3/04), 890 So.2d 579; Johnson v. Orleans Parish Sch. Bd., 2004-1352 (La.App. 4 Cir. 2/16/05), 897 So.2d 812; Johnson v. Orleans Parish Sch. Bd., 2005-0796 (La.App. 4 Cir. 3/22/06), 929 So.2d 761; and Johnson v. Orleans Parish Sch. Bd., 2005-1488 (La.App. 4 Cir. 8/9/06), 938 So.2d 219.

Insurance Coverage

Southern American Insurance Company issued a policy of comprehensive general liability (CGL) to HANO that was in effect from January 19, 1976 to May 31, 1978 and a policy of excess coverage that was in effect from March of 1976 to March of 1977.[2] U.S. Fire Insurance Company issued a policy of comprehensive general liability (CGL) that was in effect from May 30, 1978 to May 30, 1981. National Union Fire Insurance Company of Pittsburgh, PA issued a policy of comprehensive general liability to HANO that was in effect from May 30, 1981 to May 30,

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[2] Louisiana Insurance Guaranty Association (LIGA) has been substituted as the proper party for Southern American Insurance Company which is now in liquidation.

1984. Republic Insurance Company issued a policy of comprehensive general liability (CGL) to HANO that was in effect from May 31, 1984 to May 31, 1985. In addition to the "Comprehensive General Liability Insurance" portion of each of the insurers' policies, which provides "Coverage A — Bodily Injury" and "Coverage B — Property Damage," the policies contain separate and distinct "Personal Injury Liability Insurance" for what is termed under the policy "Coverage P — Personal Injury". This coverage, which is set forth under a separate heading in each of the policies, is an additional aspect of coverage, for claims that are not covered under the "Comprehensive General Liability Insurance" policy. The trial court found that this "Personal Injury Liability" provides coverage for the plaintiffs' loss of property values and emotional distress claims.

The purpose of liability insurance is to afford the insured protection from damage claims. Policies therefore should be construed to effect, and not to deny, coverage. Thus, if policy language is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. Garcia v. St. Bernard School Bd., 576 So.2d 975, 976 (La. 1991); Breland v. Schilling, 550 So.2d 609, 610 (La. 1989). As such, any ambiguity in the policy must be resolved in favor of the insured.

The "personal injury" portion of each of the policies in question provides that the insurer will pay "all sums" that the insured (HANO) becomes legally obligated to pay as a result of the insured's invasion of a right of private occupancy. Unlike the CGL portion of the policies in question, there is no declaration limiting the scope of this coverage. The trial court found that since the plaintiffs' claims are for

damages arising from the "interference with plaintiffs' reasonable and comfortable use and enjoyment of their property," i.e. an invasion of their right of private occupancy, the language of each of the insurers' "personal injury" portion of their policies provides coverage for all of the plaintiffs' claims asserted in this lawsuit. This is an issue of first impression in this state. Courts in jurisdictions with rules of construction similar to Louisiana's have determined that interference with a right of occupancy constitutes "personal injury" as opposed to "bodily injury" which usually means a physical injury or illness, under the same policy language contained in the "personal injury" coverage portion of the policies in question in this case. In Millers Mutual Ins. Ass'n of Illinois v. Graham Oil Co.,[3] an Illinois state court found that seepage of gasoline onto the plaintiff's property from the defendant's property constituted a "wrongful entry" under the personal injury coverage portion of the policy and was covered, even though the same claim was not covered under the property damage or bodily injury coverage portions of the policy. Similarly, in Titan Holdings Syndicate, Inc. v. City of Keene, N.H.,[4] a federal court held that claims for damages from the operation of the defendant's facility constituted an "invasion of a right of private occupancy" giving rise to coverage under the "personal injury" portion of the policy at issue. Accordingly, we agree with the trial court's finding on this issue.

HANO's insurers argue that because the plaintiffs did not begin to suffer emotional distress until

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[3] 668 N.E.2d 223 (2d Dist. 1996)

[4] 898 F.2d 265(1st Cir. 1990)

1994, their injuries did not manifest, i.e. "occur" within the policy period. We do not agree with this argument. In Cole v. Celotex, the Louisiana Supreme Court concluded that the insurance coverage is triggered by the mere exposure to the harmful conditions during the policy period. 599 So.2d 1076-77. The Court reasoned that the exposure theory comports with a literal construction of the policy language, maximizes coverage, and honors the contracting parties' intent by providing for consistency between the insured's tort liability and the insurer's coverage. Id. The "personal injury" coverage in the policies does not place any restrictions on when the damages must occur for coverage to arise. Instead, the "personal injury" coverage portion in each of their policies states that the policy will provide coverage for all damages arising from an invasion of a right to a private occupancy regardless of the date of manifestation of the injury. For the coverage to apply, all that the policies require is for the "invasion of the right of private occupancy" to take place during the policy period.

The plaintiffs' emotional distress claims are claims for "bodily injury" under each of the policies that the insurer defendants issued in favor of HANO. Louisiana Courts have construed claims for emotional distress to be claims for "bodily injury" for purposes of insurance coverage. Crabtree v. State Farm Ins. Co., 93-0509 (La. 2/28/94), 632 So.2d 736; Levy v. Duclaux, 324 So.2d 1 (La.App. 4 Cir. 1975). In Crabtree, the Louisiana Supreme Court held that emotional injuries are "sickness or disease," because "[w]hile such an experience operates primarily on the mind of the victim such suffering cannot be isolated from the body." 632 So.2d at 743. The Court

went on to say, "We are unable to separate a person's nerves and tensions from his body." Id.

For the foregoing reasons, we agree with the trial court that this "Personal Injury Liability" provides coverage for the plaintiffs' loss of property values and emotional distress claims. We also clarify that HANO's insurers should have to pay all sums owed by HANO to the class, subject to their right to seek contribution from the other insurers, HANO, and the City for any sums they are obligated to pay for claims that fall outside of their terms of coverage.

CONCLUSION

Based upon our careful review of the extensive record in this case, we find that the trial court erred in its award of damages for emotional distress. Accordingly, we reduced the amount awarded for emotional distress by 50%. We find nothing else with the trial court's judgment to be manifestly erroneous or clearly wrong. We also find that the trial court correctly applied the law. Accordingly, in all other respects the judgment of the trial court is affirmed.

AFFIRMED IN PART AND REVERSED AND RENDERED IN PART

CANNIZZARO, J., DISSENTS IN PART WITH REASONS

I respectfully dissent from the majority opinion insofar as it upholds the trial court's finding that the "Personal Injury Liability" ("PIL") provisions of the defendant-insurers' policies provide coverage for the

plaintiffs' loss of property values and emotional distress claims.

As set forth in her reasons for judgment, the trial court found as a matter of fact and law that the defendant, the Housing Authority of New Orleans ("HANO"), was negligent in directing the construction of Press Park on the Agriculture Street Landfill ("ASL") site, and HANO's negligence was the cause of the plaintiffs' injuries. The court held that as a result of HANO's negligence, the plaintiffs suffered compensable damages in the form of loss of property value and extraordinary mental and emotional distress. Correspondingly, the court also concluded that because the plaintiffs' damages arose from the "'interference with [their] reasonable and comfortable use and enjoyment of their property,' *i.e.* an invasion of their right to private occupancy," their claims were covered under the PIL provisions in the defendant-insurers' policies. The court also found that HANO, as the owner and operator of Press Park, was strictly liable to the Press Park tenants and residents pursuant to La. C.C. art. 2317.

Between 1971 and 1993, the year the plaintiffs filed their lawsuit, the defendant, HANO, was insured intermittently by the following four named defendant-insurers: Louisiana Insurance Guaranty Association ("LIGA") as successor in interest to Southern American Insurance Company; U.S. Fire Insurance Company of America ("U.S. Fire"); National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), and Republican Insurance Company ("Republic"). In addition to the "Comprehensive General Liability Insurance" ("CGL") portion of each of the insurers' policies, which provides "Coverage A – Bodily Injury" and "Coverage B – Property

Damage," the policies contain separate and distinct PIL insurance for what is termed under the policy "Coverage P – Personal Injury." This PIL coverage, which is set forth under a separate heading in each of the policies, is an additional aspect of coverage, for claims not covered under the CGL policies.[1] In relevant part, the PIL policies issued by the defendant-insurers provided the following:

> **I. - Coverage P — PERSONAL INJURY LIABILITY**
>
> The company will pay on behalf of the insured all sums which the insured [HANO] shall become legally obligated to pay as

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[1] As discussed *infra*, the issue of whether the plaintiffs' claims are covered by the PIL portion, as opposed to the bodily injury or property damage portions of the defendant-insurers' policies, is a matter of first impression in this state. In a case similar to the one at hand, *County of Columbia v. Continental Insurance Company*, 189 A.D. 2d 391, 595 N.Y.2d 988 (N.Y. App. Div. 3rd 1993), the court explained succinctly the distinction between general liability insurance and PIL insurance. At issue in that case was whether a landowner's claim for environmental damage to his real property constituted a "wrongful entry or eviction or other invasion of the right of private occupancy" so as to come within the PIL coverage of the defendants' policies. Explaining the difference between general liability coverage and personal injury coverage, the court stated:

> Unlike a general insurance policy, where coverage is stated in very broad terms and subject to clearly defined exceptions (as is the case in the bodily injury and property damage coverage of defendants' policies), the personal injury coverage is "buil[t] from the ground up [and] affords coverage only for defined risks. As such, coverage is limited to "claims ... actually arising out of the enumerated ... torts."

189 A.D. 2d at 395, 595 N.Y.2d at 991 (N.Y. App. Div. 3rd 1993) (citations omitted).

> damages because of injury (herein called 'personal injury') sustained by any person or organization and arising out of one or more of the following offenses committed in the conduct of the named insured's business:
>
> Group A – false arrest, detention or imprisonment, or malicious prosecution:
>
> Group B – the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right to privacy; . . .;
>
> Group C – wrongful entry or eviction, or other invasion of the right of private occupancy;
>
> if such offense is committed during the policy period . . .[2]

It is under this foregoing section (Group C) of the respective policies that the plaintiffs sought coverage for their alleged injuries.

After considering the defendant-insurers' insurance polices in full, I believe the trial court erred, as a matter of law, in construing HANO's interference with the plaintiffs' reasonable and comfortable use and enjoyment of their property as an "invasion of the right of private occupancy" as contemplated by the PIL portion of the policies.

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[2] The policies issued by LIGA, U.S. Fire, and National Union contain nearly identical language. The PIL coverage section of Republic's policy, although differently worded, is substantively identical to the PIL coverage sections of the other defendant- insurers' policies.

It is well-settled that an insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contract set forth in the Louisiana Civil Code. *Sims v. Mulhearn Funeral Home, Inc.*, 07-0054, p. 7 (La. 5/22/07), 956 So. 2d 583, 589. According to those rules, the responsibility of the judiciary in interpreting insurance contracts is to determine the parties' common intent. *Id.*; *See* La. C.C. art. 2045. In ascertaining the common intent, words and phrases in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning, in which case, the words must be ascribed their technical meaning. *See* La. C.C. art. 2047; *Sims*, 07-0054, p. 8, 956 So. 2d at 589.

An insurance contract is to be construed as a whole and each provision in the contract must be interpreted in light of the other provisions. One provision of the contract should not be construed separately at the expense of disregarding other provisions. *See* La. C.C. art. 2050; *Sims*, 07-0054, p. 8, 956 So. 2d at 589. Neither should an insurance policy be interpreted in an unreasonable or strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Id.*

When the words of an insurance contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent and courts must enforce the contract as written. *See* La. C.C. art. 2046; *Sims*, 07-0054, p. 8, 956 So. 2d at 589. "Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation

when the policy's provisions are couched in unambiguous terms." *Sims*, 07-0054, pp. 8-9, 956 So. 2d at 589. The rules of contractual interpretation do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making a new contract when the terms express with sufficient clarity the parties' intent. *Id.* at p. 9, 956 So. 2d at 589.

If after applying the general rules of contractual interpretation to an insurance contract, an ambiguity remains, the ambiguous contractual provision is generally construed against the insurer and in favor of coverage. *See* La. C.C. art. 2056; *Sims*, 07-0054, p. 9, 956 So. 2d at 590. Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Id.* This strict construction principle applies, however, only if the ambiguous policy provision is susceptible to two or more reasonable interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable. *Id.* The determination of whether a contract is clear or unambiguous is a question of law. *Id.*

Under the defendant-insurers' policies, coverage for PIL is limited to a specifically-enumerated list of torts or "offenses" that fall within that coverage provision. PIL coverage also requires that the enumerated offense be "committed" (a term that connotes an intentional, deliberate or willful act) in the conduct of HANO's business.

Louisiana law defines "intent" to mean "'that the defendant either desired to bring about the physical

results of his act or believed they were substantially certain to follow from what he did.'" *Cole v. State Department of Safety and Corrections*, 01-2123, p. 7 (La. 9/4/02), 825 So. 2d 1134, 1140 (quoting *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981.) Each enumerated offense in Coverage P is an intentional tort under Louisiana law. *See* W. McKenzie and H. Alston Johnson, III, 15 *Louisiana Civil Law Treatise: Insurance Law & Practice* §§ 12.3, 12.9 (false imprisonment), § 12.17 (malicious prosecution); *Fitzgerald v. Tucker*, 98-2313, p. 10 (La. 6/29/99), 737 So. 2d 706, 715 (defamation); *Ledbetter v. Concord Gen. Corp.*, 564 So. 2d 732, 737 (La. App. 2d Cir. 1990) ("wrongful entry" occurred when a hotel guest broke into another guest's room); *Regency Motors of Metairie, L.L.C. v. Hibernia-Rosenthal Ins. Agency, Inc.*, 03-1312 (La. App. 5 Cir. 2/23/04), 868 So. 2d 905, *writ denied*, 04-0753 (La. 5/7/04), 872 So. 2d 1087 (eviction requires actual impingement on the occupant's possessory rights); Holmes, *Appleman on Insurance Law & Practice* (2nd Ed.) § 131.2[D] ("Personal injury liability coverage obligates the insurer to indemnify for liability incurred for certain intentional acts by the insured.").

It follows then that "other invasion of the right of private occupancy" also requires an active, knowing, and intentional act. This conclusion is further bolstered by the plain, ordinary and generally prevailing meaning of the term "invasion" as an actual entry.

In this case, the plaintiffs never alleged nor introduced any evidence at trial that HANO committed an intentional tort, evicted the plaintiffs from their homes or property, denied the plaintiffs access to their homes or property; committed a wrongful en-

try into their homes or onto their property, or otherwise wrongfully occupied or interfered with their possessory rights or interests in their property. In other words, the plaintiffs failed to demonstrate that HANO committed any of the enumerated offenses listed in the PIL provisions of its policies. Moreover, as indicated in her reasons for judgment, the trial judge found HANO liable based on negligence and strict liability pursuant to La. C.C. art. 2317, but at no time did she find HANO's conduct was intentional.

Although never deeming the language "other invasion of the right of private occupancy" ambiguous, and never identifying any alternate reasonable interpretation of that phrase, and despite never finding any intentional conduct on the part of HANO, the trial court concluded the plaintiffs' claims fall within the definition of "personal injury" under the PIL provision of the policies given "Louisiana's rules of policy interpretation that favor coverage. . ." However, as discussed above, the rule of strict construction against the insurer and in favor of the insured applies only if an ambiguity exists and the ambiguity has two or more reasonable interpretations. In my opinion, not only is there no ambiguity in the contractual provision at issue herein, there are no reasonable alternative interpretations of "other invasion of the right of private occupancy."

Group C offenses for purposes of PIL coverage are "wrongful entry or eviction," as well as "other invasion of the right of private occupancy." Under Louisiana's rules for interpretation of contracts, the latter cannot be construed without reference to the former. Further, applying the doctrine of *ejusdem*

generis[3], the term "other invasion of right of private occupancy" draws its meaning from and is to be construed analogously with the term "wrongful entry or eviction," which clearly requires interference with a possessory interest.

In *Regency Motors of Metairie, L.L.C., supra*, 03-1312, p. 1, 868 So. 2d at 905, the court construed the meaning of "eviction" in a personal injury coverage provision. The court cited *Black's Law Dictionary*'s definition of "eviction" as "'[t]he act or process of legally dispossessing a person of land or rental property'" and "actual eviction" as a "'physical expulsion of a person from land or rental property.'" *Id.* at p. 6, 868 So. 2d 909. The court also stated that "'wrongful'" is "'characterized by unfairness or injustice ...contrary to law; unlawful.'" *Id.* Affirming a summary judgment in favor of the insurer, the court held the insurer did not breach the duty to defend or indemnify the insured under the PIL coverage because "[t]here was no actual impingement on any possessory rights [the plaintiffs) may have had." *Id.* at 7, 868 So. 2d 909. And in *Ledbetter v. Concord Gen. Corp., supra*, 564 So. 2d 732, the court found cover-

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[3] *Black's Law Dictionary* 556 (8th ed. 2004) defines *ejusdem generis* as:

> A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, the general language *or any other farm animal*— despite its seeming breadth would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

age was provided under the PIL provision of a policy to an innkeeper who had a duty to maintain a secure premises and to protect against "wrongful entry" arising from a guest breaking into another guest's locked room.

Further, in Louisiana, the term "occupancy" is synonymous with the state of being inhabited (*i.e.*, physical possession of property), and a "right of occupancy" is consistently construed as a right associated with the act of inhabiting (*i.e.*, physically possessing) a premises.[4] Also, coverage for "other invasion of the right of private occupancy" is limited to

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[4] *See, e.g., Richard v. Broussord*, 495 So. 2d 1291, 1293 (La. 1986) (where lessor enforces lease by obtaining a money judgment against lessee, the lease remains in effect and lessee retains the right of occupancy); *Lichtemtag v. Bowens*, 237 So. 2d 377 (La. 1970) ("in eviction proceedings demanding the right of possession or occupancy of real property, the value of the right of occupancy and not the value of the property determines a court's jurisdiction"); *Leblanc v. Romero*, 00-1233 (La. App. 3 Cir. 2/28/01), 783 So. 2d 419 ("occupancy" of property means to reside thereon, and thus contractual right of reversion should vendee cease to " permanently occupy" property was triggered when vendee moved off the property; La. C.C. art. 3412 (occupancy includes the "taking of possession of a corporeal movable"); La. C.C. art. 3418 ("one who has taken possession of an abandoned thing with the intent to own it acquires ownership by occupancy"); La. C.C.P. art. 4702 (requiring written notice when owner of immovable property wishes to evict the "occupant" therefrom, after the purpose of the occupancy has ceased"); La. C.C.P. art. 4704 ("Occupant" includes ... any person occupying immovable property by permission or accommodation of the owner, former owner, or another occupant...."); La. C.C.P. art. 4731 (where lessee or occupant has lost his right of occupancy for any reason, the lessor or owner "may cause the lessee or occupant ... to show cause why he should not be ordered to deliver possession of the premises to the lessor or owner").

rights associated with inhabiting the premises, as opposed to using the premises. *Applemon* at § 131.2[D].

Applying the traditional principles of contract interpretation to the PIL policy provisions of the defendant-insurers' policies, the language "other invasion of the right of private occupancy" is unambiguous and needs no further interpretation. The trial court's conclusion that an "interference with the plaintiffs' reasonable and comfortable use and enjoyment of their property" constituted an "invasion of their right to private occupancy" as contemplated under the PIL provision of the policies is clearly wrong, as a matter of law.

Acknowledging the lack of Louisiana jurisprudence on the issue at hand, the majority, on page 22 of its opinion, states that "[c]ourts in jurisdictions with rules of construction similar to Louisiana's have determined that interference with a right of occupancy constitutes 'personal injury' as opposed to 'bodily injury' which usually means a physical injury or illness, under the same policy language contained in the 'personal injury' coverage portion of the policies in question in this case." I submit that such a statement is circular reasoning, as the issue is not whether an invasion of the "right of (private) occupancy" constitutes an offense under the PIL portion of the policy (clearly it does) but whether an interference with a possessory interest is required in order to constitute the offense of an "other invasion of the right of private occupancy." I believe it is.

I further note that in support of its conclusion that the PIL provisions of the defendant-insurers' policies provide coverage for the plaintiffs' damages,

the majority relies on two cases from other jurisdictions, namely, *Miller Mutual Ins. Ass'n of Illinois v. Graham Oil Co.*, 668 N.E.2d 223 (Ill. 2d Dist. 1996) and *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990). I believe those cases are distinguishable from the case at hand because they dealt with an insurer's duty to defend, which is broader than an insurer's duty to indemnify, and because the issue was before the court on a summary judgment or judgment on the pleadings.

In summary, the plaintiffs here stipulated that they sustained no physical bodily injuries or property damages as a result of HANO's actions, and they offered no evidence at trial that HANO committed any of the enumerated offenses in Group C of the PIL provision of the policies. Thus, in the absence of any finding by the trial court that HANO intentionally interfered with the plaintiffs' possessory interests or invaded their rights of private occupancy in their properties, I believe that the plaintiffs' claims for damages for the diminution of their property values and emotional distress are not covered by the PIL provisions of the defendant-insurers' policies.

APPENDIX B

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 93-14333 DIVISION "J" SECTION 13

c/w: 94-5446
c/w: 94-12996
c/w 95-13271
ALL CASES

JOHN JOHNSON, ET AL

VERSUS

ORLEANS PARISH SCHOOL BOARD, ET AL

FILED _____ _____
DEPUTY CLERK

JUDGMENT

The captioned matter came on for a non-jury trial beginning on January 7, 2005, and ending on March 11, 2005, on the merits of all the Plaintiffs' claims on behalf of the Certified Class and against the following Defendants: The City of New Orleans, The Housing Authority of New Orleans ("HANO"), The Orleans Parish School Board, and the insurers for the Housing Authority of New Orleans ("Insurers"): Republic Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, U.S. Fire Insurance Company, and the Louisiana Insurance Guaranty Association ("LIGA") for Southern American Insurance Company, in Liquidation.

Present for the Plaintiffs, Class Counsel:
Suzette Bagneris

Joseph M. Bruno
Linda S. Harang
Stephen B. Murray
George J. G. Roux
And
Stephen Kreller
Justin I. Woods

Present for the Defendants:

Gregory C. Weiss, Michael Hall,
Appearing for the City of New Orleans

Roy J. Rodney, Jr., John K. Etter,
Appearing for the Housing Authority of New Orleans

Nannette V. Jolivette, E. Campbell Wallace
Appearing for the Orleans Parish School Board

Michael V. Clegg, Brent B. Boxill,
Appearing for Republic Insurance Com pany

Richard W. Bryan, Marshall J. Simien, Jr.,
Appearing for National Union Fire Insur ance Company

Claude A. Greco,
Appearing for LIGA, Southern American Insurance Company

Wendy K. Lappenga, Lizbeth J. Lemke,
Appearing for U.S. Fire Insurance Com pany

The Court, having considered the evidence regarding the claims against the Defendants, and for the Reasons separately assigned this same date, enters Judgment in favor of the Plaintiff Class and

against all of the Defendants. The Plaintiff Class in whose favor this Judgment is entered was defined by this Court on September 15, 1999, as follows:

> All persons who are a member of at least one of the following 4 groups, and who, as a direct result and consequence of living or working on, and/or owning property on the Site, have at least one of the following claims: loss of value to their property and/or to their businesses, mental and emotional distress, fear of contraction of cancer and other diseases, medical monitoring for early detection of certain diseases or illnesses, relocation, and/or any other economic loss.[1]
>
> 1. Current and former residents who have lived on the site of the former landfill, as defined as the area bounded on the north by Higgins Blvd., on the east by Louisa Street, on the south by Florida Avenue and on the west by Almonaster Avenue and the Peoples Avenue Canal, for at least twelve months prior to February 1, 1994.
>
> 2. Current and former business owners and their employees who have operated a business on the former landfill site, as described above, for at least twelve months prior to February 1, 1994.

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[1] The Court notes that on November 10, 2004, the Court granted, in part, the Defendants' motions for summary judgment on the issue of the Plaintiffs' claims for medical monitoring. Those claims, therefore, were dismissed in the Judgment signed on November 24, 2004. There was no appeal from this ruling; the Judgment is final.

3. Current residents who are the owners of record of their homes, or who are buying their homes but have not yet completed their payments.

4. Former students and employees of Moton Elementary School who attended or worked at the school on the site of the former landfill for at least twelve months or one full school year prior to February 1, 1994.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the peremptory exceptions of prescription filed by all Defendants are DENIED. The Class Members' claims were timely filed August 31, 1993, in Civil Action 93-14333, and are not prescribed.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the Class and against the City of New Orleans, on the City's affirmative defense of "discretionary function" immunity. The Court finds that the City did not meet its burden of proof on this affirmative defense.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the Class and against the Housing Authority of New Orleans, on HANO's affirmative defense of "discretionary function" immunity. The Court finds that HANO did not meet its burden of proof on this affirmative defense.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the Class and against the Orleans Parish School Board, on the School Board's affirmative defense of

"discretionary function" immunity. The Court finds that the School Board did not meet its burden of proof on this affirmative defense.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the City of New Orleans and against the Orleans Parish School Board, on the School Board's cross-claim under the Hazardous Waste Cleanup Law ("HWCL"). Accordingly, the School Board's cross-claim against the City of New Orleans under HWCL is hereby DISMISSED.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of HANO and against the Orleans Parish School Board, on the School Board's third-party claims against HANO for stigma damages and diminution of property value. Accordingly, the School Board's third-party claims against HANO for stigma damages and diminution of property value are hereby **DISMISSED**.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the following groups of the Plaintiff Class:

> All persons who are a member of at least one of the following 3 groups, and who, as a direct result and consequence of living or working on, and/or owning property on the Site, have at least one of the following claims: loss of value to their property and/or to their businesses, mental and emotional distress, fear of contraction of cancer and other diseases, medical monitoring for early detection of certain diseases or illnesses, relocation, and/or any other economic loss.

1. Current and former residents who have lived on the site of the former landfill, as defined as the area bounded on the north by Higgins Blvd., on the east by Louisa Street, on the south by Florida Avenue and on the west by Almonaster Avenue and the Peoples Avenue Canal, for at least twelve months prior to February 1, 1994.

2. Current and former business owners and their employees who have operated a business on the former landfill site, as described above, for at least twelve months prior to February 1, 1994.

3. Current residents who are the owners of record of their homes, or who are buying their homes but have not yet completed their payments.

and against the City of New Orleans and the Housing Authority of New Orleans and its Insurers, jointly and *in solido*, for all compensatory damages hereafter judicially determined to have been sustained by each member of these groups of the Class, with judicial interest from the date of demand on August 31, 1993, and for costs to be fixed by the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the following group of the Plaintiff Class and against the Orleans Parish School Board for all compensatory damages hereafter judicially determined to have been sustained by each member of this group of the Class, with judicial interest and costs from the date of demand:

All persons who are a member of at least one of the following group, and who, as a direct result and consequence of living or working on, and/or owning property on the Site, have at least one of the following claims: loss of value to their property and/or to their businesses, mental and emotional distress, fear of contraction of cancer and other diseases, medical monitoring for early detection of certain diseases or illnesses, relocation, and/or any other economic loss.

Former students and employees of Moton Elementary School who attended or worked at the school on the site of the former landfill for at least twelve months or one full school year prior to February 1, 1994.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be Judgment herein against the City of New Orleans and the Housing Authority of New Orleans and its Insurers, jointly and *in solido*, and in favor of each of the following Plaintiffs for the amounts stated below, with interest thereon from August 31, 1993, until paid, as compensatory damages:

A. Phyllis Minerva George Smith in the sum of SEVENTY-TWO THOUSAND AND no/100 ($72,000.00) DOLLARS;

B. Don Harrison Lewis, Sr., in the sum of ONE HUNDRED FIFTY-FIVE THOUSAND AND no/100 ($155,000.00) DOLLARS;

C. Nathan Parker in the sum of ONE HUNDRED FORTY-FIVE THOUSAND AND no/100 ($145,000.00) DOLLARS;

D. Viola Naomi Washington Allen in the sum of ONE HUNDRED FORTY THOUSAND AND no/100 ($140,000.00) DOLLARS;

E. Peggy Williams Grandpre in the sum of SIXTY-THREE THOUSAND FIVE HUNDRED AND no/100 ($63,500.00) DOLLARS;

F. Lizette Gaines Watson in the sum of SEVEN THOUSAND AND no/100 ($7,000.00) DOLLARS;

G. Fannie Lee Johnson in the sum of FIFTY THOUSAND AND no/100 ($50,000.00) DOLLARS;

H. Iris Russell Myers in the sum of TWO THOUSAND FIVE HUNDRED AND no/100 ($2,500.00) DOLLARS;

I. Diarra Ayodele McCormick in the sum of FORTY THOUSAND AND no/100 ($40,000.00) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that for the six school years from 1988-89 through 1993-94 in which Diarra McCormick was a student at Moton School while she was also living directly on the Agriculture Street Landfill ("ASL") site, the School Board is jointly liable with the City and HANO and its Insurers for that portion of her damages in the amount of $12000.00 (as a part of her total award of $40,000.00). As to the joint liability shared by the School Board with the City and HANO and its insurers for this six-year portion ($12000.00) of her total damages ($40,000.00), the Court apportions the virile share of the Defendants as: School Board – 33 1/3%; the City – 33 1/3%; HANO – 33 1/3%.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that the fault, and virile share liability for purposes of compensatory damages as to each Defendant, is:

Groups 1, 2, 3 of the Class:

A. City of New Orleans	50%
B. Housing Authority of New Orleans and its insurers (according to their years of coverage)	50%

Group 4 (Moton School) of the Class:

A. Orleans Parish School Board	100%

The Court further enters Judgment as follows:

1. **LIABILITY**

The Court finds as a matter of fact and law that none of the Plaintiffs are "contributorily negligent" in causing their losses or damages, as that term was defined in Louisiana prior to August 1, 1980.

The City of New Orleans

The Court finds as a matter of fact and law that the City of New Orleans was negligent in its actions and inactions that resulted in the conversion of its own former municipal landfill into the residential area that has become known as the Agriculture Street Landfill (ASL) neighborhood. The Court finds as a matter of fact and law that the entire ASL site, within the boundaries drawn by the United States Environmental Protection Agency in 1994, is "unreasonably dangerous" as that term is defined in Louisiana.

The Court holds that as a direct result of the City's negligence, and the "unreasonably dangerous"

condition of the ASL site, the Members of the "John Johnson" Class[2] have suffered compensable damages and losses in the form of loss of property value, and extraordinary mental and emotional distress. The Court finds that the City's negligence is a cause in fact and in law of the Class Members' damages. LA. CIV. CODE ANN. ART. 2315. Further, the Court finds that the City's negligent acts occurred before August 1, 1980; therefore, pre-1980 law applies to the City's conduct.

The Housing Authority of New Orleans

The Court finds as a matter of fact and law that the Housing Authority of New Orleans was negligent in its actions and inactions that resulted in the construction of the Press Park townhomes and apartments on property that was formerly part of the City's municipal landfill on the ASL site. The Court further finds as a matter of fact and law that Press Park, as a part of the ASL site within the boundaries drawn by the United States Environmental Protection Agency in 1994, is "unreasonably dangerous" as that term is defined in Louisiana.

The Court holds that as a direct result of HANO's negligence, the Class Members have suffered compensable damages and losses in the form of loss of property value, and extraordinary mental and emotional distress. The Court finds that HANO's negligence is a cause in fact and in law of the Class Members' damages. As the owner and operator of Press Park, HANO is strictly liable to the Press Park tenants and residents. LA. CIV. CODE ANN. ART. 2317.

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[2] Class membership is determined by the criteria established in this Court's September 15, 1999, Judgment certifying this case as a class action.

Further, the Court finds that HANO's negligent acts occurred before August 1, 1980; therefore, pre-1980 law applies to HANO's conduct.

In Solido Liability

The Court further holds that the cooperative agreement entered into between the City and the Housing Authority of New Orleans as early as May 24, 1967, and the ongoing cooperation between the City (through the City Improvement Association) and HANO in developing the ASL site from 1968 through 1982, renders the City and HANO liable jointly and *in solido* (as this term was defined prior to a change in the law that became effective August 1, 1980) for the damages suffered by the following Class Members:

(1) owners and residents of the Gordon Plaza single family homes for one full year at any time before February 1, 1994[3];

(2) owners, residents, and full time employees of the Press Park townhomes and apartments for one full year at any time before February 1, 1994;

(3) owner, residents, and full time employees of the Gordon Plaza Senior Apartments for one full year at any time before February 1, 1994;

(4) owners, operators, and full time employees of businesses located within the EPA's 1994

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[3] In accordance with the Class Definition, the criteria for Class membership ends on February 1, 1994. This date does not, however, mark the end of the period during which the Class Members have suffered damages.

boundaries for one full year at any time before February 1, 1994;

(5) owners of land in the "undeveloped area" of the ASL site along Almonaster Boulevard for one full year at any time before February 1, 1994;

(6) owners and residents of homes or owners of undeveloped land in the "adjacent area" (within the Class boundaries and between Montegut and Feliciana Streets and the West side of Louisa Street) for one full year at any time before February 1, 1994.

(7) owners and operators of businesses and their employees in the "adjacent area" (within the Class boundaries and between Montegut and Feliciana Streets and the West side of Louisa Street) for one full year at any time before February 1, 1994.

Further, the Court holds that the City's and HANO's negligent acts occurred before August 1, 1980, such that pre-1980 law applies to their fault and conduct, thereby rendering them liable jointly and *in solido* to the groups of Class Members listed above. LA. CIV. CODE ANN. ARTS. 2091 and 2324.

Louisiana Insurance Guaranty Association

The Court finds as a matter of fact and law that Southern American Insurance Company issued a policy of comprehensive general liability (CGL) to HANO that was in effect from 1/19/76 to 5/31/78 (SAIC Policy SL 601372), and a policy of excess coverage that was in effect from 3/78 to 3/77 (SAIC Policy SU 001001). The Court finds that the Plaintiffs Phyllis Smith, Don Lewis, Sr., and Lizette Gaines

sustained injury within the policy periods, and their claims for loss of property value and mental and emotional distress are thereby covered losses under the "personal injury liability" portions of Southern's policies.

The Court finds, therefore, as a matter of fact and law that Louisiana Insurance Guaranty Association (LIGA), for Southern American Insurance Company, in Liquidation, is directly liable to the Plaintiffs and to its insured, HANO, for all of HANO's liability to the Class Members who, like Phyllis Smith, Don Lewis, Sr., and Lizette Gaines sustained damages caused by exposures to the contaminated soil at times that were within Southern's policy periods, from 1/19/76 to 5/31/78. Further, the Court finds as a matter of fact and law that LIGA is entitled to a credit for that portion of the damages that any Class Members receive from any other insurance company. LA. REV. STAT. ANN. 22:1386.

U.S. Fire Insurance Company

The Court finds as a matter of fact and law that U.S. Fire insurance Company issued a policy of comprehensive general liability (CGL) to HANO that was in effect from 5/30/78 to 5/30/81 (USF Policy 540190737). The Court finds that the Plaintiffs Phyllis Smith, Don Lewis, Sr., and Lizette Gaines sustained injury within the policy periods, and their claims for loss of property value and mental and emotional distress are thereby covered losses under the "personal injury liability" portions of U.S. Fire's policy.

The Court finds, therefore, as a matter of fact and law that U.S. Fire Insurance Company is directly liable to the Plaintiffs and to its insured, HANO, for

all of HANO's liability to the Class Members who, like Phyllis Smith, Don Lewis, Sr., and Lizette Gaines sustained damages caused by exposures to the contaminated soil at times that were within U.S. Fire's policy periods from 5/30/78 to 5/30/81.

National Union Fire Insurance Company of Pittsburgh, PA

The Court finds as a matter of fact and law that National Union Fire Insurance Company of Pittsburgh, PA, issued a policy of comprehensive general liability (CGL) to HANO that was in effect from 5/30/81 to 5/30/84 (NU Policy GLA 956-7417). The Court finds that the Plaintiffs Phyllis Smith, Don Lewis, Sr., Nathan Parker, Viola Allen, Peggy Grandpre, Lizette Gaines, Fannie Johnson, and Diarra McCormick sustained injury within the policy periods, and their claims for loss of property value and mental and emotional distress are thereby covered losses under the "personal injury liability" portions of National Union's policy.

The Court finds, therefore, as a matter of fact and law that National Union Fire Insurance Company of Pittsburgh, PA, is directly liable to the Plaintiffs and to its insured, HANO, for all of HANO's liability to the Class Members who, like Phyllis Smith, Don Lewis, Sr., Nathan Parker, Viola Allen, Peggy Grandpre, Lizette Gaines, Fannie Johnson, and Diarra McCormick sustained damages caused by exposures to the contaminated soil at times that were within National Union's policy periods from 5/30/81 to 5/30/84.

Republic Insurance Company

The Court finds as a matter of fact and law that Republic Insurance Company issued a policy of com-

prehensive general liability (CGL) to HANO that was in effect from 5/31/84 to 5/31/85 (RIC Policy CDG2848). The Court finds that the Plaintiffs Phyllis Smith, Don Lewis, Sr., Nathan Parker, Viola Allen, Peggy Grandpre, Lizette Gaines, Fannie Johnson, and Diarra McCormick sustained injury within the policy periods, and their claims for loss of property value and mental and emotional distress are thereby covered losses under the "personal injury liability" portions of Republic's policy.

The Court finds, therefore, as a matter of fact and law that Republic Insurance Company is directly liable to the Plaintiffs and to its insured, HANO, for all of HANO's liability to the Class Members who, like Phyllis Smith, Don Lewis, Sr., Nathan Parker, Viola Allen, Peggy Grandpre, Lizette Gaines, Fannie Johnson, and Diarra McCormick sustained damages caused by exposures to the contaminated soil at times that were within Republic's policy periods from 5/31/84 to 5/31/85.

The Orleans Parish School Board

The Court finds as a matter of fact and law that the Orleans Parish School Board was negligent in its actions and inactions that resulted in the construction and operation of Robert Moton Elementary School on Abundance Street, which was formerly part of the City's municipal landfill on the ASL site. The Court finds as a matter of fact and law that Moton Elementary School, as a part of the ASL site within the boundaries drawn by the United States Environmental Protection Agency in 1994, is "unreasonably dangerous" as that term in defined in Louisiana.

The Court holds that as a direct result of the School Board's negligence, these Class Members have suffered compensable damages and losses in the form of extraordinary mental and emotional distress. The Court finds that the School Board's negligence is a cause in fact and in law of these Class Members' damages. As the owner and operator of Moton Elementary School, the School Board is solely and strictly liable to all who were full time students or full time employees at Moton for at least one complete school year between and including the 1986-87 school year, through and including the 1993-94 school year. LA. CIV. CODE ANN. ART. 2317. Therefore, the Court assesses the School Board's fault for the damages suffered by these Class Members at 100%.

Further, the Court finds that the School Board's negligent acts occurred before April 16, 1996; therefore, pre-1996 law applies to the School Board's conduct.

2. DAMAGES — CATEGORIES, AMOUNTS

The Court finds that the Class Members should be awarded damages as follows:

Loss of Property Value

A. Property directly on the ASL site

The Court finds as a matter of fact and law that the Class Members' property, within the boundaries drawn by the United States Environmental Protection Agency in 1994 ("the ASL site"), cannot be fully and adequately environmentally remediated without the complete destruction of their homes or businesses. Accordingly, the stigma associated with being located directly on top of a "Superfund Site", the

permanent land use restrictions placed on the Class Members' properties (including the property owners' continuing obligation to maintain the semi-permeable barrier that now separates the clean top-soil from the contaminated soil), and the continuing presence of more than 140 toxic and hazardous materials directly under the Class Members' homes and businesses, have all combined to reduce the value of their properties to such a diminished state as to render them unmerchantable and worthless.

The Court is satisfied that if the Class Members had known the true condition of the ASL site before they purchased their properties, or if they had known that their property was located on a former municipal landfill, they would not have agreed to buy property on the ASL site.

The Court holds, therefore, as a matter of fact and law that all Class Members who owned property (whether developed or undeveloped) before February 1, 1994, within the boundaries drawn by the United States Environmental Protection Agency in 1994 ("the ASL site"), and did not know before their purchase that their property was located on a former municipal landfill, are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's Insurers (according to the years of their policies and coverage), in the full amount of their fair market value, as that value is determined at the time they are appraised in support of their claims.

B. Property in the "adjacent area"

The Court finds as a matter of fact and law that the Class Members who owned property (whether developed or undeveloped) before February 1, 1994, within the "adjacent area" (located within the

boundaries of the Class and between Montegut and Feliciana Streets and the West side of Louisa Street), have suffered a diminution of value in their properties, due to the stigma associated with their close proximity some as close as directly across the street) to the ASL "Superfund Site" ("the ASL site").

Accordingly, the Court finds as a matter of fact and law that these Class Members are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's Insurers (according to the years of their policies and coverage), in the amount of 10% of their fair market value, as that value is determined at the time they are appraised in support of their claims.

Mental and Emotional Distress

C. Orleans Parish School Board

For the former full time students and full time employees of Moton Elementary School, the Court finds as a matter of fact and law that these Class Members are entitled to emotional distress damages based on their years of attendance or employment at Moton School.

In 1994, when the United States Environmental Protection Agency declared a portion of the ASL neighborhood to be a "Superfund Site", the Moton School property was included within the "Superfund" boundaries. This caused these Class Members to suffer extreme stress beginning in 1994, when the EPA first published its findings from soil testing at the ASL site, and resulted in the closure of the School in 1994.

The Court holds that the stress suffered by these Class Members since 1994 is of a type that is so

unique and extraordinary in nature that it is not merely speculative, but is real and compensable, and arises out of the Class Members' exposures to the toxic and hazardous materials that contaminate the ASL site. The Court, therefore, holds these Class Members are entitled to compensation from the Orleans Parish School Board in the amount of $2,000.00 for each year of their full time attendance or full time employment at Moton School from and including the 1986-87 school years through and including the 1993-94 school years.

D. Plaintiffs directly on the ASL site

The Court finds as a matter of fact and law that the Class Members who lived or worked directly on the ASL site (that portion of the ASL neighborhood located within the EPA's 1994 "Superfund" boundaries) have suffered mental and emotional distress due to the shocking realization in 1994 that their homes and businesses were located on a "Superfund Site". These Class Members began to suffer extreme stress in 1994, when the EPA first published its findings from soil testing at the ASL site, and placed the site on the National Priorities List ("NPL"). The Court, therefore, holds that their emotional distress arose from and is proportional to their years of exposures to the toxic and hazardous materials that contaminate the ASL site.

The Court finds as a matter of fact and law that the stress suffered by these Class Members is of a type that is so unique and extraordinary in nature that it is not merely speculative, but is real and compensable. Although there is no evidence of any Class Member having been diagnosed with a bodily injury or disease that has been medically related to

the contaminated soil, the Court finds that the actual and extensive damage occurring to the Class Members' property since 1972 has been clearly established.

In 2000-2001, the EPA performed a partial remediation of approximately 10% of the ASL site. The contaminants at the very surface of a portion of the ASL site were excavated and replaced with clean soil, (there was no excavation of the contaminated soil under the streets or under any homes or buildings), and a semi-permeable barrier was installed between the clean topsoil and the contaminated soil that is just 2' below the surface (less than 2' in some areas due to the presence of underground utilities, water lines, phone lines, drainage, etc.).

The Court holds that it is reasonable for each Class Member's emotional distress to be proportional to the length of time they lived or worked on the ASL site prior to the year 2001, and were thereby exposed on a daily basis to the hazardous and toxic materials that were at the surface of their properties and at a depth of 20' in the soil. The Court further holds that these daily exposures to hazardous materials from 1972 through 2001 constitute an "occurrence" of a "personal injury" as those terms are defined in Louisiana.

The Court, therefore, holds that the following amounts are reasonable to fairly compensate these Class Members in an amount that is directly proportional to their years of residence:

For 1- up to 5 years	$4,000.00 (per year)
For 5- up to 10 years	$25,000.00 (total)
For 10- up to 15 years	$30,000.00 (total)

For 15- up to 20 years $40,000.00 (total)

For 20 years or more $50,000.00 (total)

E. Plaintiffs in the "adjacent area"

For residents of the "adjacent area", the Court finds as a matter of fact and law that although they are entitled to damages for the emotional distress they suffered from learning in 1994 that they had been living or working in close proximity to a "Superfund Site" for many years, they are not entitled to the same level of compensation as the Class Members who lived or worked directly on the contaminated property, and within the EPA's 1994 boundaries. Therefore, the Court holds that each Class Member, who lived or worked for one full year in the "adjacent area" before February 1, 1994, is entitled to the total amount of $2,500.00 in emotional distress damages.[4]

3. DAMAGES — SPECIFIC AMOUNT

Based on the Court's holdings, as stated above, the individual Plaintiffs are awarded damages as follows:

A. Phyllis Minerva George Smith

The City and HANO are liable jointly and *in solido* to Plaintiff Phyllis Minerva George Smith for compensatory damages in the following amounts:

(1) Loss of property value $22,000.00

(2) Emotional distress $50,000.00

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[4] This is the reasonable amount of emotional distress damages that will fairly compensate each Class Member who lived in the "adjacent area" for one full year before February 1, 1994, regardless of the total number of years of residency.

B. Don Harrison Lewis, Sr.

The City and HANO are liable jointly and *in solido* to Plaintiff Don Harrison Lewis, Sr., for compensatory damages in the following amounts:

(1) Loss of property value	$105,000.00
(2) Emotional distress	$50,000.00

C. Nathan Parker

The City and HANO are liable jointly and *in solido* to Plaintiff Nathan Parker for compensatory damages in the following amounts:

(1) Loss of property value	$95,000.00
(2) Emotional distress	$50,000.00

D. Viola Naomi Washington Allen

The City and HANO are liable jointly and *in solido* to Plaintiff Viola Naomi Washington Allen for compensatory damages in the following amounts:

(1) Loss of property value	$90,000.00
(2) Emotional distress	$50,000.00

E. Peggy Williams Grandpre

The City and HANO are liable jointly and *in solido* to Plaintiff Peggy Williams Grandpre for compensatory damages in the following amounts:

(1) Loss of property value	$13,500.00
(2) Emotional distress	$50,000.00

F. Lizette Gaines Watson

The City and HANO are liable jointly and *in solido* to Plaintiff Lizette Gaines Watson for compensatory damages in the following amounts:

(1) Diminution of property value $4,500.00

(2) Emotional distress $2,500.00

G. Fannie Lee Johnson

The City and HANO are liable jointly and *in solido* to Plaintiff Fannie Lee Johnson for compensatory damages in the following amount:

(1) Emotional distress $50,000.00

H. Iris Russell Myers

The City and HANO are liable jointly and *in solido* to Plaintiff Iris Russell Myers for compensatory damages in the following amount:

(1) Emotional distress $2,500.00

I. Diarra Ayodele McCormick

The City and HANO are liable jointly and *in solido* to Plaintiff Diarra Ayodele McCormick for her years of residence in Gordon Plaza in the following amount:

(1) Emotional distress $40,000.00 (total)

The Court further finds that for the six years that Diarra McCormick lived in Gordon Plaza while she was a student at Moton School, the School Board is jointly liable with the City and HANO for her emotional distress damages, in the amount of $12,000.00 ($2,000.00 per year for each year of her full time attendance at the School). As to the joint liability shared by the School Board with the City and HANO for this six-year portion of her total damages, the Court finds the School Board is liable for a virile share of 33 1/3%, and the City and HANO are each liable for a virile share of 33 1/3%.

4. COSTS, EXPENSES, JUDICIAL INTEREST

The Court finds that the City, HANO, the School Board, LIGA, U.S. Fire Insurance Company, National Union Fire Insurance Company, and Republic Insurance Company are each liable to the Plaintiffs for one-seventh of the Plaintiffs' costs and expenses that are chargeable to this trial.

The Court also finds that the City, HANO and its Insurers, and the School Board are each liable to the Plaintiffs for their respective percentages of pre-Judgment interest in the amount prescribed by law, from the date of judicial demand on August 31, 1993, until the date of this Judgment, and for all post-Judgment interest from the date of this Judgment until paid in the amount prescribed by law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that in accordance with article 1915(B)(1) of the Louisiana Code of Civil Procedure, the Court finds that there is no just reason for delay, and that, accordingly, the Court designates this Judgment to be final and appealable.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court retains jurisdiction over all of the Class Members' individual claims for compensatory damages, and all other matters necessary to this Court's management of this Class Action until all matters have been resolved and the case is closed.

REASONS FOR JUDGMENT SIGNED at New Orleans, Louisiana, this 12 day of January, 2006.

/s/ Nadine M Ramsey
Nadine M. Ramsey, Judge

APPENDIX C

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 93-14333 **Division "J"** **SECTION 13**
c/w: 94-5446
c/w: 94-12996
c/w: 95-13271
ALL CASES

JOHN JOHNSON, ET AL

VERSUS

ORLEANS PARISH SCHOOL BOARD, ET AL

FILED_____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

Pursuant to its authority and duty under articles 1631-1637 of the Louisiana Code of Civil Procedure, this Court held a non-jury trial beginning on January 7, 2005, and ending on March 11, 2005, of all of the Plaintiffs' claims on behalf of the Certified Class and against the following Defendants: The City of New Orleans, The Housing Authority of New Orleans ("HANO"), The Orleans Parish School Board, Republic Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, U.S. Fire Insurance Company, and the Louisiana Insurance Guaranty Association ("LIGA") for Southern American Insurance Company, in Liquidation.

The Court, having considered the applicable law, and the evidence and testimony in the Record, entered Judgment this date in favor of the Plaintiffs on behalf of the Certified Class and against all of the Defendants. The Court's findings of fact and conclusions of law on which its Judgment are based are as follows:

FINDINGS OF FACT – GENERAL

1. From the early 1900s until approximately 1958, the City leased more than one hundred acres of land in the Ninth Ward for the operation of a municipal landfill and garbage dump. It was known as the Agriculture Street Landfill ("ASL").

2. The Agriculture Street Landfill was located on the property bordered by Almonaster Boulevard on the West, Higgins Boulevard on the North, Louisa Street on the East, and the Peoples Avenue Canal and railroad tracks on the South. The ASL was used to dispose of ash from the City of New Orleans incinerators. The landfill was closed in 1958.

3. In 1965, the City re-opened the ASL site for the disposal of massive quantities of debris created by Hurricane Betsy. Up to three hundred truckloads per day of trash material was burned for nine months. No specific closure plan was followed.

4. In 1967, the City of New Orleans and HANO entered into a cooperative agreement for the development of residential properties in the Desire area of the City.

5. Between 1969 and 1971, Drexel Development Corporation constructed the Press Park town homes and apartments for HANO.

6. There was no remediation or special site preparation work done before Press Park was constructed.

7. HANO supervised and monitored the construction of Press Park.

8. HANO was required to obtain City approval through the City Planning Commission for the Press Park scattered-site development.

9. In 1971, HANO purchased the completed Press Park project from Drexel, containing 257 units.

10. Since 1971, HANO has owned and managed Press Park.

11. Some Press Park tenants participated in a "turn key" program, whereby a portion of their monthly rent was placed in an escrow account and applied toward the purchase of their town home unit. When their escrow account reached the amount needed for purchase of the unit, HANO transferred title of the unit to the owner.

12. HANO did not advise prospective Press Park tenants or "turn key" home buyers that the site had once been a part of the City's landfill.

13. Children from around the ASL neighborhood played on the Press Park playground, located behind the Shirley Jefferson Commu-

nity Center, at the corner of Press and Benefit Streets.

14. Children from around the ASL neighborhood played at the Bertha Magruer Playground, owned and operated by the City (NORD), located at the corner of Feliciana and Industry Streets.

15. In 1975, the School Board purchased a tract of land along Abundance Street in the ASL neighborhood, with the intent to build an elementary school.

16. In the late 1970s, the City performed soil testing in the Gordon Plaza area of the ASL neighborhood, in anticipation of the construction of the Gordon Plaza single-family homes.

17. As a result of the soil testing, the City required the developer of Gordon Plaza to add topsoil before constructing the homes.

18. The City has never produced a copy of the Gordon Plaza area soil testing and has not explained why the report was never produced.

19. In 1980, sixty-seven single-family homes were built comprising Gordon Plaza.

20. The Gordon Plaza home buyers were not told that their homes were located on what had once been a part of the City's landfill.

21. The School Board purchased land on the ASL site in the mid-1970's. In 1984, the School Board began plans for construction of

the Moton Elementary School on the ASL site.

22. Because the School Board knew when it purchased the property that the Moton School site had once been a part of the City's landfill, the School Board hired engineering firms to conduct an environmental evaluation of the School Board's property.

23. Environmental testing on the School site identified the presence of numerous toxic and hazardous materials, including lead, arsenic, mercury, and polycyclic aromatic hydrocarbons (PAHs).

24. Because of the presence of the toxic and hazardous materials, the School Board hired several environmental consultants to advise the School Board on how the School site could be remediated to eliminate the danger of harmful exposures created by the presence of the hazardous materials.

25. The environmental consultants noted that the School Board did not ask them to report on whether the site was appropriate for a school, rather the School Board asked them to advise on how the site could be remediated. The environmental consultants recommended that the entire site be excavated to a depth of three feet, with the top three feet of contaminated soil removed and replaced with two feet of clean topsoil. Between the clean topsoil and the hazardous materials, the consultants recommended that a layer of six inch to one foot of impermeable clay be placed over the entire site.

26. In addition to the remediation plan they recommended for the School site, the environmental consultants also advised the School Board that it must not conduct any activities on the site to cause a breach or penetration of the clay barrier.

27. The environmental consultants also advised the School Board to implement a plan for the routine, periodic testing and monitoring of the School property to ensure that the contaminants are not migrating to the surface.

28. The environmental consultants noted that younger people are more susceptible to absorbing toxic materials and storing it in their systems for many years.

29. At a School Board meeting on February 25, 1985, the environmental consultants advised that the site may pose an unacceptable risk of exposure to hazardous materials to construction crews, school children and staff, and potentially to neighbors via ground and surface water.

30. After construction of the School was underway, the construction plans were changed, eliminating the impermeable clay barrier. No other impermeable material was substituted for the clay barrier.

31. Before construction began on the School site, there was no fence or barrier around the School Board's property. Neighborhood children played on the School board's undeveloped land.

32. The residents of the adjacent area- streets between Montegut and Feliciana Streets and the West side of Louisa Street were exposed to dust from the contaminated ASL soil as a result of the various construction activities on the ASL site (Press Park, Gordon Plaza, and Moton School).

33. The Environmental Protection Agency ("EPA") tested the soil in parts of the ASL neighborhood in 1986 to determine whether the ASL site was contaminated.

34. The residents were not given the results of the EPA's 1986 soil tests.

35. After the 1986 tests, the residents were not told that their property was contaminated, nor were they given any special instructions to follow or precautions to take to protect themselves from exposures to the soil.

36. Between 1985 and 1986, the Louisiana Department of Health and the Agency for Toxic Substance Disease Registry ("ATSDR") conducted a public health screening of children in the ASL neighborhood to determine whether there was an increased incidence of elevated blood lead levels.

37. After the 1985-86 health screening, the residents were not told that their children had been exposed to excess levels of lead, nor were they given any special instructions to follow or precautions to take to protect their children from exposures to the soil.

38. In 1986-87, Moton School opened for kindergarten through sixth grade. There were ap-

proximately nine hundred children enrolled in the School.

39. The School Board did not tell its employees or the parents of the Moton students that the School had been built on a part of the City's former landfill or that environmental testing had identified the presence of toxic materials on the School site.

40. Between 1991 and 1992, there were plumbing problems at Moton School caused by a construction defect, which required under-slab construction and repairs.

41. The plumbing repairs at the School were conducted while the School was in session.

42. The construction trench around the School was deep enough for an adult to stand erect, indicating that the three-foot layer of clean topsoil had been breached.

43. In 1993, the EPA came back to the ASL site and conducted more soil tests throughout the neighborhood.

44. After the 1993 tests, the EPA told the ASL residents that their soil was contaminated with more than one hundred and forty toxic and hazardous materials, more than forty of which are known to cause cancer in humans.

45. After the 1993 tests, the EPA told the ASL residents to take special precautions to protect themselves from any exposure to the soil. As a part of the effort to prevent further exposures to the contaminated soil, the children's playground equipment at the Press Park playground was removed.

46. After the 1993 tests, the EPA fenced the undeveloped land along Almonaster Boulevard to restrict access to it.

47. In 1994, the EPA placed a portion of the ASL neighborhood on the National Priorities List ("NPL"). Later in 1994, the EPA declared the ASL site sufficiently contaminated to warrant declaring it a Superfund, one of the most toxic and hazardous sites in the United States.

48. In 1994, a HANO official recommended that HANO stop placing new tenants in Press Park and should offer to move Press Park tenants into off-site housing. HANO did not enact this policy.

49. In 1994, the ASL residents formed the Concerned Citizens of the Agriculture Street Landfill, Inc. to qualify for federal grant funding to pay for the services of an environmental Technical Advisor.

50. In response to the public outcry following the announcement of the Superfund designation of a portion of the ASL neighborhood, the School Board closed the Moton School campus. For the next six school years the School Board rented a closed Catholic school in the Broadmoor area and bussed the Moton elementary students across town every day for school.

51. In the mid-1990s, the EPA proposed a remediation plan for the ASL site that would remove and replace the top two feet of soil, where possible, with a semi-permeable barrier between the clean topsoil and the con-

taminated soil. The soil under buildings and the streets would not be disturbed.

52. The ASL residents and the Mayor of the City of New Orleans opposed the EPA's plan as being inadequate to remediate the site. The ASL residents and the Mayor supported an alternate voluntary relocation/buy-out plan.

53. The EPA rejected the requests of the ASL residents and the Mayor. From 2000-2001, the EPA financed a $20 million remediation of approximately ten percent of the contaminated soil at the ASL site, which left ninety percent of the hazardous and toxic materials on the ASL site as a permanent condition of the site. The ten percent measurement is based on the fact that the ASL site measures almost ninety-five acres, no soil was removed from under buildings, houses, or streets, and the EPA measured the toxic contamination throughout the ninety-five-acre ASL site to reach a depth of approximately twenty feet.

54. In the remediation process, approximately two feet of soil was removed from around houses and buildings where possible. Due to underground utilities, water lines, etc., only one foot of soil was removed in some areas.

55. After the EPA completed the remediation work, the ASL residents were given a certificate of completion confirming that their property had been partially remediated.

56. Along with the certificate of completion, the EPA gave the ASL residents a list of permanent restrictions on their use of their prop-

erty and advised the ASL residents that they were responsible for maintaining the integrity of the clean layer of topsoil and the felt-like material that comprises the semi-permeable barrier.

57. The City of New Orleans did not challenge the EPA's findings regarding the nature or extent of the contamination on the ASL site or offer any alternative findings.

58. HANO did not challenge the EPA's findings regarding the nature or extent of the contamination on the ASL Site or offer any alternative findings.

59. Other than the soil testing in the Gordon Plaza area in the late 1970s, for which no report has ever been produced, the City of New Orleans has never conducted any environmental testing anywhere in the ASL neighborhood.

60. HANO has never conducted environmental testing anywhere in the ASL neighborhood.

61. The City of New Orleans has never offered to assist any of the ASL residents in moving away from the ASL site.

62. HANO has never offered to move any of the Press Park tenants into other HANO-managed properties.

63. Marlin Gusman, who served as the City's Minority Business Counselor from 1981 to 1983, Directory of Property Management from 1984 to 1986, and Chief Administrative Officer from 1994 to 2000, testified that even though the Mayor opposed the remediation

in favor of relocation, the City did not set aside funding within its annual budget to address the environmental concerns of the ASL residents. The City did not undertake efforts to determine whether there was any real estate that the City owned that it could use to relocate the residents. The City did not provide any protective gear to the residents during the remediation.

64. As a result of the contaminated condition of the soil at the ASL site, the residents were exposed on a daily basis to more than 140 toxic and hazardous materials from 1972 though 2001.

65. The environmental problems at the ASL site have caused the ASL residents to suffer an extraordinary amount of stress since 1993, when they were first told about the contaminated condition of their soil.

66. The residents' stress has been caused by their knowledge that from 1972 though 2001 they were living on one of the most contaminated sites in the United States, and that they and their children were exposed on a daily basis to the more than 140 toxic and hazardous materials in their soil.

67. The contaminated condition of the soil on the ASL site is an incurable defect in the properties, because the Class Members are not economically or physically able to cure the problem through their own efforts.

68. There is no scientific evidence that the contamination two feet beneath the surface of

the ASL soil will not migrate to the surface and re-expose the ASL residents.

69. For an indefinite time into the future, the EPA will visit the ASL site every five years and re-test the soil to measure whether the contaminants are migrating to the surface.

70. If future testing reveals the recurrence of contamination at the surface, then the EPA will recommend additional remediation of the ASL site.

71. The ASL residents have been told that as result of the EPA remediation they are now at a ***reduced risk*** of exposure, and the ***immediate health risk*** that existed on the ASL site has been eliminated.

72. No one has told the ASL residents that they are now at ***no risk*** of exposure to contamination at the ASL site.

73. Because of the ongoing nature of the environmental investigations of the ASL site, the ASL residents can never be assured that their property will be safe.

FINDINGS OF FACT – PLAINTIFF-SPECIFIC

1. Phyllis Smith owns and lives in a town home located at 3001 Press Street, in the Press Park area of the ASL neighborhood. She has lived there since 1972.

2. Ms. Smith's town home is within the EPA's 1994 Superfund site boundaries.

3. Ms. Smith decided to move to Press Park following various meetings with HANO representatives. Before she moved to Press Park,

she did not know that the site had once been part of a City landfill.

4. The first time Ms. Smith was told that there was an environmental problem with her property was in the late part of 1993.

5. After some testing in 1994, the EPA notified Ms. Smith that her property was contaminated and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

6. Nothing was done to reduce Ms. Smith's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of her property.

7. The contamination on Ms. Smith's property is an incurable defect, rendering her property unmerchantable and worthless. But for the contamination, her property would have had a fair market value at the time of trial of $22,000.00.

8. As a direct result of living and owning property on a Superfund site for more than 20 years, Mrs. Smith has suffered severe emotional distress.

9. Don Lewis owns and lives in a single-family home at 2885 Abundance Street in the Gordon Plaza area of the ASL neighborhood. He has lived there since 1981.

10. Mr. Lewis's house is within the EPA's 1994 Superfund boundaries.

11. Before he bought his house in Gordon Plaza, Mr. Lewis lived at 3007 Press Street in

Press Park from 1972 to 1981. Although he knew that there had once been a City garbage dump somewhere in the Desire area, he did not know that his Press Park house or his Gordon Plaza house were built on the former City landfill site.

12. Mr. Lewis attended a neighborhood meeting in 1985, at which there was a discussion of shoddy construction of the Gordon Plaza homes. There was no discussion at this meeting of possible soil contamination in the ASL neighborhood.

13. The first time Mr. Lewis was told that there might be an environmental problem with his property was in 1986 when the EPA tested his soil. After the testing, the EPA did not tell him that his property was contaminated, nor did the EPA give him any special instructions to follow or precautions to take. He, therefore, believed his property was safe.

14. The first time that Mr. Lewis was told that there was an environmental problem with his property was in the late part of 1993.

15. After some testing in 1994, the EPA notified Mr. Lewis that his property was contaminated and that he would have to begin taking extraordinary measures to protect himself from harmful exposures.

16. Nothing was done to reduce Mr. Lewis's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of his property.

17. The contamination on Mr. Lewis's property is an incurable defect, rendering his property unmerchantable and worthless. But for the contamination, his property would have had a fair market value at the time of trial of $105,000.00.

18. As a direct result of living and owning property on a Superfund site for more than twenty years, Mr. Lewis has suffered severe emotional distress.

19. Nathan Parker owns and lives in a single-family home at 10 Gordon Plaza Drive in the Gordon Plaza area of the ASL neighborhood. He has lived there since 1981.

20. Mr. Parker's house is within the EPA's 1994 Superfund site boundaries.

21. Before he moved to Gordon Plaza, Mr. Parker did not know that the site had once been part of a City landfill.

22. The first time Mr. Parker was told that there was an environmental problem with his property was in the late part of 1993.

23. After some testing in 1994, the EPA notified Mr. Parker that his property was contaminated and that he would have to begin taking extraordinary measures to protect himself from harmful exposures.

24. Nothing was done to reduce Mr. Parker's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of his property.

25. The contamination on Mr. Parker's property is an incurable defect, rendering his property unmerchantable and worthless. But for the contamination, his property would have had a fair market value at the time of trial of $95,000.00.

26. As a direct result of living and owning property on a Superfund site for more than twenty years, Mr. Parker has suffered severe emotional distress.

27. Viola Allen owns and lives in a single-family home at 2897 Abundance Street in the Gordon Plaza area of the ASL neighborhood. She has lived there since 1981.

28. Mrs. Allen's house is within the EPA's 1994 Superfund site boundaries.

29. Before she moved to Gordon Plaza, Mrs. Allen did not know that the site had once been a part of a City landfill.

30. The first time Mrs. Allen was told that there was an environmental problem with her property was in the late part of 1993.

31. After some testing in 1994, the EPA notified Mrs. Allen that her property was contaminated, and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

32. Nothing was done to reduce Mrs. Allen's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of her property.

33. The contamination on Mrs. Allen's property is an incurable defect, rendering her property unmerchantable and worthless. But for the contamination, her property would have had a fair market value at the time of trial of $90,000.00.

34. As a direct result of living and owning property on a "Superfund" site for more than twenty years, Mrs. Allen has suffered severe emotional distress.

35. Peggy Grandpre is a former resident of Gordon Plaza at 59 Gordon Plaza Drive. She moved to Gordon Plaza in 1981 and was a full time resident there until December 2002 when she and her family moved to 2069 Mirabeau Avenue in New Orleans.

36. Mrs. Grandpre's Gordon Plaza house is within the EPA's 1994 Superfund site boundaries.

37. Before she moved to Gordon Plaza, Mrs. Grandpre did not know that the site had once been a part of a City landfill.

38. The first time Mrs. Grandpre was told that there was an environmental problem with her property was in the late part of 1993.

39. After some testing in 1994, the EPA notified Mrs. Grandpre that her property was contaminated and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

40. Nothing was done to reduce Mrs. Grandpre's exposures to the hazardous materials until

2000-2001, when the EPA completed a partial remediation of a portion of her property.

41. The contamination on Mrs. Grandpre's Gordon Plaza home is an incurable defect. Using the other three Gordon Plaza houses as a guide, and averaging the appraised values of the other three houses (Lewis, Parker, Allen), Mrs. Grandpre's Gordon Plaza house would have had a fair market value at the time of trial of $96,500.00, but for the contamination of her property.

42. In 2002, Mrs. Grandpre sold her home at 59 Gordon Plaza Drive for $83,000.00. This amount is $13,500.00 less than the fair market value her property would have had at the time of trial but for the contamination.

43. As a direct result of living and owning property on a Superfund site for more than twenty years, Mrs. Grandpre has suffered severe emotional distress.

44. Lizette Gaines is a former resident of the adjacent area as that term is referred to in this case at 2945 Feliciana Street. She moved to that address in 1977.

45. Before she moved to Feliciana Street, Mrs. Gaines did not know that the property across the street from her house had once been a part of a City landfill.

46. Mrs. Gaines still owns the house at 2945 Feliciana Street, but she moved from that address in 2002 to 7842 Schubert Avenue in New Orleans.

47. The first time Mrs. Gaines was told that the ASL site across the street from her house was contaminated was in the late part of 1993.

48. The proximity of Mrs. Gaines's house to the ASL Superfund site has caused her property to suffer a reduction in value of ten percent. But for its proximity to a Superfund site, her property would have had a fair market value at the time of trial of $45,500.00.

49. As a direct result of living in close proximity to a Superfund site for more than twenty years, Mrs. Gaines has suffered severe emotional distress.

50. Fannie Johnson is a former resident of Press Park. She lived in Press Park as a tenant of HANO from sometime in 1980 until 2001, at three addresses: 2913 Higgins Court; 3311 Press Street; 2915 Higgins Court. She now lives at 7001 Lawrence Road, Apt. 145 in New Orleans.

51. Mrs. Johnson's Press Park residences were all within the EPA's 1994 Superfund site boundaries.

52. Before she moved to Press Park in 1980, Mrs. Johnson did not know that the site had once been a part of a City landfill.

53. The first time Mrs. Johnson was told that there was an environmental problem with the Press Park property was in the late part of 1993.

54. After some testing in 1994, the EPA notified Mrs. Johnson that the Press Park property

was contaminated and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

55. Nothing was done to reduce Mrs. Johnson's exposures to the hazardous materials until 2001, when she demanded that HANO relocate her to other Section 8 housing.

56. As a direct result of living on a "Superfund" site for more than twenty years, Mrs. Johnson has suffered severe emotional distress.

57. Iris Myers is a former resident of the adjacent area next to the ASL site. She lived in a house at 3014 Clouet Street from May 1990 to July 1995. She now lives at 4767 Arthur Street in New Orleans.

58. Before she moved to the adjacent area in 1990, Mrs. Myers did not know that a part of the ASL neighborhood had once been a part of a City landfill.

59. The first time Mrs. Myers was told that there was an environmental problem with the ASL site was in the late part of 1993.

60. As a direct result living in close proximity to a Superfund site for five years, Mrs. Myers has suffered severe emotional distress.

61. Diarra McCormick attended Moton Elementary School for six years, from Kindergarten through Fifth grade, in the 1988-89 through 1993-94 school years.

62. In addition to her attendance at Moton School, Ms. McCormick lived with her parents at 71 Gordon Plaza Drive from her birth

in 1983 until 1998, when her family moved. Since 1998 she has lived at 3401 Franklin Avenue in New Orleans.

63. Ms. McCormick's elementary school (Moton) and her Gordon Plaza family home were within the EPA's 1994 Superfund site boundaries.

64. The first time Ms. McCormick was told that there was an environmental problem with her Gordon Plaza home and Moton School was in the late part of 1993.

65. Ms. McCormick learned about the nature and extent of the environmental problems at the ASL site from her parents and from her attendance at community meetings.

66. At no time while she was a student at Moton School was Ms. McCormick told that the School was built on contaminated soil.

67. At no time while she was a student at Moton School was Ms. McCormick told to take any special precautions to protect herself from exposures to the contaminated soil on the School property.

68. At no time during the under-slab plumbing repairs at Moton School in 1991-1992 was Ms. McCormick told to take any special precautions to protect herself from exposures to the contaminated soil in the construction area or from dust generated by the construction activities.

69. As a direct result of living and attending school on a Superfund site for more than fif-

teen years, Ms. McCormick has suffered severe emotional distress.

CONCLUSIONS OF LAW

1. PRESCRIPTION

The Court finds for the following reasons that the Class Members' claims were timely filed August 31, 1993, in Civil Action 93-14333, and are not prescribed. La. Civ. Code Ann. art. 3447. Prescription is an affirmative defense; the party raising this defense carries the burden of proof at trial. La. Civ. Code art. 3452; La Code Civ. Proc. art. 927(B); *Campo v. Correa*, 797 So. 2d 115, (La. App. 4 Cir. 2001).

The Plaintiffs' claims are subject to the liberative prescription of one year. La. Civ. Code art. 3492. Prescriptive statutes are to be applied liberally and without undue restriction by technical rules. *Battiste v. Jani King of New Orleans*, 753 So. 2d 952 (La. App. 4 Cir. 2000). Under Louisiana law, prescription begins to run when "it can be objectively determined that the exercise of reasonable diligence would have alerted a reasonably minded plaintiff of the reasonable possibility that [it] was the victim of tortious conduct." *Kendall Co. v. Southern Medical Supplies, Inc.*, 913 F. Supp. 483, 488 (E.D. La. 1996), citing *Griffin v. Kinberger*, 507 So. 2d 821, 823 (La. 1987).

Louisiana courts have long recognized that prescription does not run against one unable to act, which is based on the ancient civilian doctrine of *contra non valentem agere nulla currit praescriptio. Hendrick v. ABC Ins. Co.*, 787 So. 2d 283, 289 (La. 2001). In such case, the prescriptive period begins to run on the date that the injured party discovered or should have discovered the existence of facts that would entitle him to bring suit. *Doskey v. Hebert*,

645 So. 2d 674, 679 (La. App. 4 Cir. 1994) (citing *Cartwright v. Chrysler Corporation*, 232 So. 2d 285 (La. 1970)). There are four categories of situations where Louisiana courts have applied the doctrine of contra non valentem to prevent the accrual of liberative prescription: (1) where there is some legal cause which prevented the Courts or their officers from taking cognizance of or acting on the plaintiffs action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Id.*

The first two categories of the doctrine are not relevant to this case. The third category applies to cases where defendant engages in conduct which prevents the plaintiff from availing himself of his judicial remedies. *Id.* at 680. The fourth category, commonly known as the discovery rule, provides that prescription does not run against one who is ignorant of the facts upon which his cause of action is based, as long as such ignorance is not willful, negligent or unreasonable. *Id.* (citing *Wimberly v. Gatch*, 635 So. 2d 206, 211-212 (La.1994).

The Court finds that the principle of *contra non valentem* i.e. the discovery rule applies to the facts of this case. In this case, the Plaintiffs were given no information about the prior use of their neighborhood as a municipal landfill before they purchased their property or moved to the Site as a tenant.

From 1984 through 1993 the residents were told by various governmental agencies, including the EPA, the ATSDR, the Louisiana Department of Environmental Quality ("DEQ"), the Louisiana Department of Health, and the School Board that their neighborhood was safe. During this same period of time, the City and HANO were publicly silent. In fact, the City and HANO claim that they had no knowledge until 1993 that the property was contaminated.

The Court finds that the Plaintiffs did not know before they moved to the ASL neighborhood that the site had once been a City landfill. Although there were some environmental investigations in the ASL neighborhood in the mid-1980s, the Plaintiffs were not given sufficient information such that they should have known that their properties were contaminated or that they were in danger. Until the late part of 1993, no one told any of the Plaintiffs that their health was at risk or that they should take any special precautions to protect themselves from exposure to the soil in their own properties.

The plaintiffs in this case testified extensively at the class certification hearing in 1999, a hearing on defendants' exception of prescription in 2003, and at trial on the subject of when they first learned that their property was contaminated. On each of these occasions, and particularly in this trial, the Plaintiffs were subject to rigorous, intense cross-examination by all defense counsel. The Court is impressed with the sincerity of these Plaintiffs and is convinced that they did not know, nor could they have reasonably known, until 1993 that their neighborhood is contaminated.

The Court also finds that the Defendants should not benefit from their own silence. During the same period of time, the Defendants claim they knew nothing about the contaminated condition of the soil or the hazardous materials to which the Plaintiffs were being exposed on a daily basis. Nevertheless, the Defendants claim that somehow the Plaintiffs, who are ordinary citizens with no special education or scientific training should have been able to acquire knowledge superior to that of the City, HANO, the School Board, the Louisiana Department of Health, DEQ, ATSDR, and the EPA.

2. ADVERSE PRESUMPTION

Plaintiffs assert that the Court should apply an adverse presumption against defendants for not calling certain witnesses. "One of the fundamental rules of evidence is that a failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case or to produce evidence of a more explicit, direct, and satisfactory character than that relied on by him, raises the inference or presumption that the testimony of the witness not called would not sustain his contention and that if more satisfactory evidence had been given it would prove detrimental in his cause." *Bates v. Blitz*, 17 So. 2d 816 (La. 1944). The Court noted that the adverse presumption is applicable particularly where no effort has been made to substantiate the statement of a witness whose credibility, although put in doubt, is susceptible of corroboration. *Id.* at 547.

The defendant had called two tenants as witnesses, who were both impeached. The Court made the presumption that the other tenants, who were

not called, would not have substantiated the defendant's claim.

However, "[t]he presumption does not apply where the witness was equally available to either party. *Shelvin v. Waste Management, Inc.*, 580 So. 2d 1022 (La. App. 3 Cir. 1991). In *Shelvin*, the Court declined to find an adverse presumption, reasoning that the witness was no longer defendant's employee, that the other party had learned of his existence well before trial, and he was equally available to both parties.

Similarly, in *Sauve Heirs, Inc. v. Reynaud Construction Co., Inc.*, 441 So. 2d 239 (La. App. 4 Cir. 1983) the court declined to apply an adverse presumption. The court reasoned that the application of the rule of adverse presumption was particularly troublesome where the witness was available to both sides and because plaintiff had the resources and the time to interview him and even take his discovery deposition to determine whether his testimony would have been favorable.

In *Williams v. General Motors Corp.*, 639 So. 2d 275 (La. App. 4 Cir. 1994), the court did not apply the adverse presumption rule to a discarded piece of evidence after finding that it was inadvertently discarded.

The Court finds that the rule of adverse presumption does not apply in this case. It does not appear that any of the witnesses were surprises or were unavailable to plaintiffs. They had the opportunity to depose them, and in fact, did depose some of them.

3. SPOLIATION OF EVIDENCE

The general principle for deciding when to apply an adverse presumption for spoliation of evidence has been described as: "[T]he failure of a litigant to produce evidence within his reach raises the presumption that the evidence would have been detrimental to his case. However, this presumption is not applicable where the failure to produce the evidence is explained." *Babineaux v. Black*, 396 So. 2d 584, 586 (La. App. 3d Cir. 1981) (citations omitted). *See also Boh Bros. Const. Co. Inc. v. Luber-Finer, Inc.*, 612 So. 2d 270, 274 (La. App. 4th Cir. 1992), *writ denied*, 614 So. 2d 1256 (La. 1993); *McElroy v. Allstate Ins. Co.*, 420 So. 2d 214, 216 (La. App. 4th Cir.), *writ denied*, 422 So. 2d 165 (La. 1982). Consequently, this Court will not apply the adverse presumption if the party offers a reasonable explanation at trial for its failure to produce the evidence.

The Court finds that the adverse presumption for "spoliation" of evidence should be applied against the City of New Orleans. Specifically, (1) the City did not produce any records from its pre-1980 soil testing of the Gordon Plaza neighborhood site: and (2) the City did not offer or attempt to offer any explanation at trial for its failure to produce this document, or, if the document no longer existed, why it had been destroyed.

Marlin Gusman testified that as the Chief Administrative Officer ("CAO") of the City, he learned that the City had performed environmental testing at the Gordon Plaza site before it was developed in 1980. As CAO he learned that the City performed these tests because the site had been used as a landfill, and "they wanted to do some testing to make

sure it was okay." He testified that he thought documents from the soil testing existed, but he could not remember who had them or where they were.

Since the City did not produce the soil testing report, and did not offer any evidence or explanation on the Record as to why it was never produced, the Court will apply the adverse presumption against the City for spoliation of this piece of evidence.

4. "DISCRETIONARY FUNCTION" IMMUNITY

The City, HANO, and School Board have all pleaded that even if they were negligent in their actions or inactions pertaining to the ASL site, they are nevertheless shielded from tort liability to the Class under the principle of "discretionary function" immunity. La. Rev. Stat. § 9:2798.1(B). For the following reasons, the Court finds that the "discretionary function" immunity does not apply to the Defendants' conduct toward the Class.

Section 9:2798.1 provides:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection 8 of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or

(2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

The Louisiana Supreme Court has established a two-step test for courts to follow when determining whether the immunity applies. *Simeon v. Doe*, 618 So. 2d 848, 852-53 (La. 1993). The court must first determine whether a statute, regulation, or policy requires the governmental agency to follow a particular course of action. *Id.* If there is such a requirement, then there is no choice or discretion, and the immunity does not apply. *Id.* If a court determines discretion is involved, the court must then determine whether that discretion "is the kind which is shielded by the exception, that is, one grounded in social, economic or political policy." *Id.* If it is, then the doctrine applies and the employee or agency is insulated from liability. *Id.* The application of this affirmative defense is "a question of fact to be determined through a trial." *Lambert v. Riverboat Gaming Enforcement Div.*, 706 So. 2d 172, 177 (La. App. 1 Cir. 1997). *See also Gary v. Meche*, 577 So. 2d 833, 835 (La. App. 3 Cir. 1991); *Chaney v. National Railroad Passenger Corporation*, 583 So. 2d 926, 930 (La. App. 1 Cir. 1991); *Verdun v. State Dept. of Health & Human Resources*, 559 So. 2d 877, 879 (La. App. 4 Cir. 1990).

Once a discretionary decision is made, the government entity is not protected from liability for conduct in carrying out the discretionary decision. *Socorro v. Orleans Levee Bd.*, 561 So. 2d 739, 756 (La. App. 4 Cir. 1990) (quoting *Wiggins v. United States*, 799 F.2d 962 (5th Cir.1986)). If the govern-

mental entity is negligent in carrying out its policy, then the entity is not protected by the immunity. *Id.*

For example, the policy decision to maintain the roadway in a reasonably safe condition has already been made by the legislature. *Chaney v. National Railroad Passenger Corp.*, 583 So. 2d 926, 929 (La. App. 1 Cir. 1991). In *Chaney*, the court discussed the issue of immunity in the context of roadways:

> Any decision regarding the manner in which the roads are made reasonably safe are operational in nature, and La. Rev. Stat. 9:2798.1 does not provide immunity for liability stemming therefrom. * * * The only policy decision that a governmental authority can make relating to a roadway, is whether or not to construct it (or assume responsibility for it in some cases) in the first place. Once that decision is made, related decisions such as the design, method of construction, number and placement of signs and signals, level of maintenance, etc. are operational decisions.

583 So. 2d at 929-30.

Once the government does undertake to supply a service, then it must be held responsible for negligent acts in supplying the service. 561 So. 2d at 756. The discretionary exception only reaches the discretionary decision as to whether to supply the service or not. *Id.* Once the discretionary decision has been made to supply the service, then sovereign immunity is waived.

The Defendants raised the "discretionary function" immunity as an affirmative defense in their Answers and pleadings. Accordingly, the Defen-

dants had the burden of proof as to their affirmative defense. An affirmative defense is one that, if proved, will absolve the defendant of liability, regardless of its otherwise-negligent conduct. *Zulli v. Coregis Ins. Co.*, 910 So. 2d 437 (La. App. 5 Cir. 2005). It must be proved by a preponderance of the evidence. *Abadie v. Markey*, 710 So. 2d 327 (La. App. 5th Cir. 1998).

The City and HANO's decision to provide the service of low-income housing was certainly an act of discretion, as was the School Board's decision to build the Moton School. However, the defendants' immunity stops at that decision. The City, through its witnesses Criminal Sheriff Marlin Gusman, and Jerald White and Sharon Carrington of the Office of Environmental Affairs admitted that it had knowledge of the use of the ASL site as a landfill from the time it began consideration of that site to build housing. Similarly, the School Board had the knowledge from the time of purchase until the school closed that the proposed Moton School site was on a former landfill. Throughout the thirteen years of this litigation, the defendants continually fail to comprehend that it was their failure to make reasonable operational decisions that subjects them to liability.

In *Chaney, supra* the court listed examples of operational decisions. Design, method of construction, and level of maintenance, etc. are operational decisions. The following are just some of the defendants' decisions that the Court finds are not subject to discretionary immunity: the City and HANO's decisions not to test for hazardous substances or not to disclose the results of those tests; the School Board's decision not to follow their environmental consultants recommendations on the type of remediation

prior to construction of Moton School; the School Board's decision not to follow their environmental consultant's advise not to dig more than three feet when it was repairing the sewerage problem; the School Board's decision not to send the children and staff home during the sewerage repairs; the defendants' decisions not to provide residents, including susceptible children any protective gear during the initial construction of the housing and the school and during the EPA remediation; the City's decision not to relocate the residents of ASL despite its public acknowledgment that the EPA remediation was not adequate; the City and HANO's decision not to disclose that the project to solve the blight and low income housing problem in New Orleans was put on a landfill; and in general, the continuous decision over more than twenty years to do virtually nothing to address the fact that there are citizens of this City, in particular, children, the most vulnerable of the population, living on a toxic waste dump.

The Court will discuss the merits of liability on these issues *infra*. For the purposes of the discretionary immunity defense, the Court finds that none of the defendants carried their burden of proof to establish that their conduct qualifies them for protection from liability under the discretionary function immunity. The Court, therefore, finds that the record establishes instead that the Defendants' conduct giving rise to the Plaintiffs' claims are of an operational nature, and not of a social, economic, or political nature.

5. CHOICE OF LAW

A. Strict Liability

La. Civ. Code art. 2317.1 provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

Art. 2317.1 was amended in 1996 to add the element of knowledge. Prior to 1996, liability under this article was a form of strict liability with no consideration of knowledge. The 1996 amendment was a substantive change in the law, and is not to be applied retroactively. *Jacobs v. City of Bunkie,* 1998-2510 (La. 5/18/99); 737 So. 2d 14.

The Court finds that the acts and omissions on which the Plaintiffs base their claims against HANO and the School Board occurred, and the Plaintiffs' cause of action accrued, before April 16, 1996. Therefore, the Court will apply the law of strict liability as it existed prior to the 1996 amendments.

Prior to 1996, article 2317 provided: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." La. Civ. Code art. 2317 (1825). It is this original form of the article that applies to the fault of HANO and the School Board in this case, since all of their tortious acts

causing harm to the Plaintiffs in this case occurred before April 16, 1996.

In an action asserting liability under La. Civ. Code art. 2317 before 1996, the plaintiff bore the burden of proving three elements: (1) that the thing which caused the damages was in the care, custody, and control (garde) of the defendant; (2) that the thing had a vice, ruin, or defect that presented an unreasonable risk of harm; and (3) that the vice, ruin, or defect was the cause-in-fact of the plaintiff's damages. *Dupree v. City of New Orleans*, 765 So. 2d 1002, 1008 (La., 2000).

The record is clear as to the first requirement that HANO has care, custody, and control of Press Park apartments and town homes since it was developed in 1971 until February 1, 1994 when the Class was defined. Similarly the School Board does not deny that it had care, custody, and control of the Moton School site since the mid- 1970s.

The second element that the plaintiff must prove is that the thing had a vice, ruin, or defect that presented an unreasonable risk of harm. 765 So. 2d a11012. "The custodian is absolved from his strict liability neither by his ignorance of the defect or vice, nor by circumstances that the defect could not easily be detected. Whether a risk is unreasonable is 'a matter wed to the facts' and must be determined in light of the facts and surrounding circumstances of each particular case." *Id.* (citations omitted).

Some factors to be considered and weighed include: (1) the claims and interests of the parties; (2) the probability of the risk occurring; (3) the gravity of the consequences; (4) the burden of adequate pre-

cautions; (5) individual and societal rights and obligations; and (6) the social utility involved. *Id.*

Just as the Court applies the law at the time, so must we look to the circumstances of that time to determine what would be considered an unreasonable risk of harm. Discussions for the development of the ASL site to address urban blight and housing shortage created by the destruction of Hurricane Betsy started as early as 1966 as evidenced by the HANO's minutes.

As early as 1921, Louisiana recognized the government's responsibility for environmental matters. Charles S. McCowan, Jr., *The Evolution of Environmental Law in Louisiana*, 52 La. L. Rev. 907, 910 (Mar. 1992). Article VI, § 1 of the Louisiana Constitution of 1921 stated "[t]he natural resources of the State shall be protected, conserved, and replenished." Early jurisprudence recognized that the government had the duty to preserve and promote public health. 52 La. L.Rev. at 907. In the mid-1960s to mid-1970's there were not many regulations on the operation of landfills or waste dumps.

Sanitation issues were regulated by sparse city code regulations. Code of the City of New Orleans, Louisiana, § 28 (1956). However, the City Code was amended in 1977 by M.C.S., Ord. No. 6353, § 1 which added an article on Solid Waste Disposal. These provisions can now be found under Chapter 138 of the 1995 Code. The Solid Waste Disposal ordinances defined solid waste and hazardous waste. Code of the City of New Orleans, Louisiana, § 28-39 (Supp. No. 6-77). The code mandated that all landfills be sanitary and prohibited disposal of hazardous waste in such landfills. §§ 28-42-28-45 (Supp No. 6-

77). The procedures mandated that "[t]he disposal of toxic or hazardous waste which may create a condition harmful to the environment, shall, at the owners expense, be rendered safe and sanitary prior to delivery to the waste disposal facility." § 28-42(5) (Supp. No. 6-77). Procedures were also developed for proper closure and monitoring of landfills. § 28-52 (Supp. No. 6-77). Further, construction of buildings, sewage or gas or waster supply mains, parking lots, or paved areas on or throughout completed portions of sites with solid waste was prohibited without a special permit. § 28-42(7) (Supp. No. 6-77).

On a statewide level, there was a bustle of environmental laws passed between the mid-1970s and the mid-1980s. In 1974, the legislature amended the constitution to state a new environmental mandate. La. Const. art. IX, § 1 (1974). Hazardous waste disposal was put under the control of the Department of Natural Resources by Act 334 of 1978. Then in 1979, the legislature enacted the Louisiana Environmental Affairs Act, La. Rev. Stat. § 30:2001 to maintain a healthful and safe environment for the people of Louisiana. In 1984, prompted by federal legislation, the Louisiana legislature addressed the problem of inactive and abandoned hazardous waste sites. La. Rev. Stat. § 30:2271. The legislature recognized that

> Hazardous chemicals and substances have been disposed of in Louisiana for many years in a manner that, although possibly legal at the time, was careless and inappropriate and created conditions which are extremely dangerous and may cause long-term health and environmental problems for the people of this state.

La. Rev. Stat. § 30:2271(A)(1).

Clearly if not by 1974 then at least by 1977, the City and HANO became aware that landfills posed an unreasonable risk to public health and safety, which prompted the enactment of new regulations on disposing of solid and hazardous wastes. At this time Press Park apartments and homes had been inhabited for at least six years. Even after the enactment of federal and state legislation recognizing the existence and dangers of hazardous waste, the City and HANO took no action with regard to the Press Park development. The City and HANO knew that the Agriculture Street Landfill was not closed according to the 1977 standards. Yet to this day, neither the City nor HANO took any steps to inquire whether there were any hazardous materials on the site. To this day, neither the City nor HANO took any steps to inquire about the safety of the residents at Press Park. As for the School Board, the risk of the toxic landfill was well known by the time Moton School was being built in 1986.

The Court notes that the Record establishes that the following conditions exist in the ASL neighborhood:

1. The soil is contaminated to a depth of twenty feet below the surface.

2. The contamination consists of more than one hundred and forty toxic and hazardous materials, more than forty of which are known to cause cancer in humans.

3. Although a partial remediation of approximately ten percent of the soil was conducted at the ASL site in 2000-2001, the remaining

ninety percent of the soil throughout the ASL site is still contaminated.

4. The barrier separating the clean topsoil from the contaminated soil is "semi-permeable", that is, it does not stop or prevent contaminants from migrating upward to the surface.

5. The EPA will re-visit the ASL site every five years for an indefinite period to measure whether the contaminants are migrating to the surface.

6. The EPA found that the site posed an "immediate threat" to the health and safety of the ASL residents, and authorized a $20 million remediation.

7. The EPA included the ASL site on its "Superfund" list, indicating that it was so contaminated as to warrant priority federal funding for the remediation project.

Therefore, the Court finds that based on the standards and the circumstances of the time, these conditions constitute a "defect" that is "unreasonably dangerous" under Louisiana law. The Court finds as an issue of fact and law that the entire ASL site, within the boundaries drawn by the United States Environmental Protection Agency in 1994, is "unreasonably dangerous" as that term is defined in Louisiana.

With each passing year, there was more and more evidence that this landfill contained hazardous materials and was not properly closed or remediated. The Plaintiffs in this case who are overwhelmingly poor minorities were promised the American dream of first time homeownership. The dream turned out

to be a nightmare. The Plaintiffs who are some of the most underrepresented in our society put their trust in the defendants' promises. Instead, the leaders of this community did nothing as the evidence of mounted that the former landfill was hazardous. Beyond creating an unreasonable risk of harm, the Court finds defendants' conduct shocking.

The City of New Orleans

The Court finds as an issue of fact and law that the City of New Orleans was negligent in its actions and inactions that resulted in the conversion of its own former municipal landfill into the residential area that has become known as the Agriculture Street Landfill (ASL) neighborhood.

As a direct result of the City's negligence, and the unreasonably dangerous condition of the ASL site, the Members of the "John Johnson" Class, as defined in this Court's ruling of September 15, 1999, have suffered compensable damages and losses in the form of loss of property value and extraordinary mental and emotional distress. The Court finds that the City breached its duty to the ASL residents. The Court finds that the City's negligence is a cause in fact and in law of the Class Members' damages. La. Civ. Code art. 2315.

Housing Authority of New Orleans

The evidence establishes that HANO is the owner of the Press Park apartments and town homes. As the owner of the property, therefore, HANO is strictly liable to all of the tenants and residents of Press Park from 1971 through and including February 1, 1994 (the date specified in the Class definition), under pre-1996 liability standards, without regard to whether HANO had knowledge at the time

that the Press Park property was contaminated, or that HANO's tenants were at an unreasonable risk of harm from exposure to the contaminated soil throughout the site. HANO had a non-delegable duty to protect its tenants and residents, but failed in its duty.

The Court finds as an issue of fact and law that the Housing Authority of New Orleans was negligent in its actions and inactions that resulted in the construction of the Press Park town homes and apartments on property that was formerly part of the City's municipal landfill on the ASL site.

As a direct result of HANO's negligence, and the "unreasonably dangerous" condition of the ASL site, the Class Members have suffered compensable damages and losses in the form of loss of property value and extraordinary mental and emotional distress. The Court finds that HANO breached its duty to the ASL residents. The Court finds that HANO's negligence is a cause in fact and in law of the Class Members' damages. As the owner and operator of Press Park, HANO is strictly liable to the Press Park tenants and residents. La. Civ. Code art. 2317.

Orleans Parish School Board

For the same reasons that apply to HANO's ownership and custody of Press Park, the Orleans Parish School Board is strictly liable to the former students and employees who attended or worked at Moton School from 1986-87 through and including the 1993-94 school year (the date specified in the Class definition). Under pre-1996 Civil Code article 2317, the School Board was and is the owner of the Moton School building and land. The contaminated condition of the soil renders the building and property

"defective", and exposed the students and employees to an unreasonable risk of harm.

The School Board continually puts forth the defense that it did extensive testing and remediation and therefore reduced or eliminated the unreasonable risk of harm. The Court acknowledges that the School Board hired consultants and conducted a remediation prior to building the school. The Court also finds that the School Board did not follow the advise of its environmental consultants. The School Board did not remediate according the specifications. Further, during the remediation, the School Board did not do anything to prevent the soil from drifting to adjacent property or to keep children from accessing the work site. Then, when the sewerage problems occurred, the School Board again dismissed the advise of their environmental consultants and dug beyond the three feet clean soil barrier thereby reopening pathways of exposure.

As a direct result of the School Board's negligence, the Class Members have suffered compensable damages and losses in the form of extraordinary mental and emotional distress. The Court finds that the School Board breached its duty to the Moton School students and employees. The Court finds that the School Board's negligence is a cause in fact and in law of these Class Members' damages. As the owner and operator of Moton Elementary School, the School Board is solely and strictly liable to all who were full time students or full time employees at Moton for at least one complete school year between and including the 1986-87 school year, through and including the 1993-94 school year. La. Civ. Code art. 2317.

6. LIABILITY

In the late 1960s, the City and the Housing Authority entered into a cooperative working agreement for the development of low-income residential housing. Specifically, this agreement was signed in May 1967.

In 1980, La. Civ. Code art. 2324 on the liability of joint tortfeasors was amended by Act 431. The amended article provides that joint tortfeasors are not solidarily bound unless the tort is intentional. Instead, a joint tortfeasor is only liable for his own percentage of fault, and cannot be solidarily liable with another tortfeasor.

The Code articles on obligations were amended again in 1984. Under amended article 1789, when the obligation between joint tortfeasors is "divisible", each joint obligor is bound to perform (*i.e.* pay) only his own portion of the damages. Combined with amended article C.C. 2324, which defined all non-intentional torts as joint and divisible, article 1789 means that under the amended law joint tortfeasors, even when they are all found to be liable to the plaintiffs, are each responsible for nothing more than their own percentages of fault (*i.e.*, their own "virile share").

In *Cole v. Celotex*, 599 So. 2d 1058 (La. 1992), the Louisiana Supreme Court considered whether the law to be applied in allocating liability among the parties is comparative or pre-comparative fault. The Court concluded that in the context of long- latency occupational disease cases, when these tortious exposures occur before Act 431's effective date are (1) significant and (2) such exposures later result in the manifestation of damages, pre-Act law applies. *Id.*

Press Park was between 1969 and 1970. The first residents arrived in 1972. Gordon Plaza was tested in 1978 and 1979, developed in 1979 and 1980. The first residents arrived in 1981. The Court finds that the City and HANO's acts in the planning and development of Press Park, Gordon Plaza, the Senior Apartments, and the commercial area occurred before August 1, 1980. Therefore, the original Code article 2324, as it applies to this case, provides: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido,* with that person, for the damage caused by such act." La. Civ. Code art. 2324 (eff. 1870).

Original Code article 2091 [which, as amended in 1984, was renumbered as article 1796], as it applies to this case, provides: "There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor." The City and HANO, therefore, are not joint tortfeasors for their negligent development of Press Park, but under pre-1980 law, they are solidary obligors.

Under pre-1980 law, the fact that the City and HANO may have different defenses, or that the elements of damages sought from each of them may be different does not change the *in solido* nature of their obligation to the Press Park residents. *Narcise v. Illinois Central R. Co.*, 427 So. 2d 1192, 1195 (La. 1983). Such factors may be important in determining whether each Defendant is liable to the Plaintiffs, but they do not affect the solidary relationship between these two tortfeasors to this part of the

Class as a whole. *Carter v. EPSCO, Inc.*, 681 F.2d 1062, 1066 (5th Cir. 1982). Once the liability of each Defendant toward the Plaintiffs is determined, they become solidary obligors, and they each have an *in solido* obligation for all of the damages that are owed to this part of the Class. *Narcise*, 427 So. 2d at 1195. The defendants then each have a right of contribution from the other for their virile share of the damages. *Id.*

The same "cooperative agreement" of 1967 was still in place in the late 1970s, when the next phases of the neighborhood were planned. This means that HANO and its insurers are solidarily liable with the City for the City's negligence in approving Gordon Plaza for construction, despite the City's apparent awareness that the soil was contaminated from its prior use as a municipal landfill, and despite the City's soil testing that revealed the presence of contaminants. The Court finds, therefore, that the City and HANO, are solidary obligors.

The Court assesses the City's fault for the damages suffered by these Class Members at fifty percent (50%) and HANO's and its Insurers fault for the damages suffered by these Class Members at fifty percent (50%).

Moton School was completed in 1986 and operated until 1994. Therefore, the Court assesses the School Board's fault for the damages suffered by these Class Members at one hundred percent (100%). Further, the Court finds that the School Board's negligent acts occurred before April 16, 1996; therefore, pre-1996 law applies to the School Board's conduct.

Insurance Carriers

The purpose of liability insurance is to afford the insured protection from damage claims. Policies therefore should be construed to effect, and not to deny, coverage. Thus, if policy language is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. *Garcia v. St. Bernard School Bd.*, 576 So. 2d 975, 976 (La. 1991); *Breland v. Schilling*, 550 So. 2d 609, 610 (La. 1989). The Court finds as a matter of law that the Plaintiffs' claims for loss of property value and emotional distress are covered under the provisions of the "Personal Injury Liability Insurance" portion of each of the Insurers' policies.

In addition to the "Comprehensive General Liability Insurance" portion of each of the Insurers' policies, which provides "Coverage A – Bodily Injury" and "Coverage B – Property Damage," the policies contain separate and distinct "Personal Injury Liability Insurance" for what is termed under the policy "Coverage P – Personal injury." This coverage, which is set forth under a separate heading in each of the policies, is an additional aspect of coverage, for claims that are not covered under the "Comprehensive General Liability Insurance" policy. The Court finds that this "Personal Injury Liability" provides coverage for the Plaintiffs' loss of property values and emotional distress claims.

The Plaintiffs' claim that HANO "interfered with the plaintiffs' reasonable and comfortable use and enjoyment of their property." Since insurance policy provisions are to be construed broadly so as to afford coverage, "interferfence] with plaintiffs' reasonable and comfortable use and enjoyment of their prop-

erty" falls within the broad "personal injury" coverage for "other invasion of the right of private occupancy."

The "personal injury" portion of each of the policies in question provides that the Insurer will pay "all sums" that the insured (HANO) becomes legally obligated to pay as a result of the insured's invasion of a right of private occupancy. Unlike the CGL portion of the policies in question, there is no declaration limiting the scope of this coverage. Since the Plaintiffs' claims are for damages arising from the "interference with plaintiffs' reasonable and comfortable use and enjoyment of their property," *i.e.* an invasion of their right of private occupancy, the language of each of the Insurers' "personal injury" portion of their policies provides coverage for all of the Plaintiffs' claims asserted in this lawsuit.

When insurance policy language is subject to more than one reasonable interpretation, the interpretation that provides coverage should be adopted. *Albritton v. Fireman's Fund Insurance Company*, 70 So. 2d 111 (La. 1954). The Court can find no case in which another Louisiana court has ruled on whether claims such as those asserted in this case can be considered "personal injury" as defined under the policies in question.

One federal court, applying Louisiana law, determined that pollution claims did not constitute claims for personal injury under a policy that defined "personal injury" as "Wrongful entry" or "eviction." *Gregory v. Tennessee Pipeline Co.*, 948 F.2d 203 (5th Cir. 1991). While this Court need not consider this case, as it has not been followed by any Louisiana court, it is nevertheless easily distinguished. The

policy at issue in that case lacked the broad "other invasion of a right of private occupancy" language present in the policies at issue in this case. *See e.g. Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265 (1st Cir. 1990) (contrasting policies containing "other invasion of a right of private occupancy" language with those merely defining personal injury as "wrongful entry or eviction"). The Court finds that jurisdictions with rules of construction similar to Louisiana's have determined that interference with a right of occupancy constitutes "personal injury" as opposed to "bodily injury", which usually means a physical injury or illness, under the same policy language contained in the "personal injury" coverage portion of the policies in question in this case. *See e.g. Millers Mut. Ins. Ass'n of Illinois v. Graham Oil Co.*, 282 III. App. 3d 129, 218 III. Dec. 60, 668 N.E.2d 223 (2d Dist. 1996); *Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265 (1st Cir. 1990); *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992).

In *Millers Mutual*, an Illinois state court applied rules of construction substantially similar to Louisiana's. That court found that seepage of gasoline onto the plaintiffs property from the defendant's property constituted a "wrongful entry" under the personal injury coverage portion of the policy and was covered, even though the same claim was not covered under the property damage or bodily injury coverage portions of the policy.

Similarly, in *Titan Holdings*, a federal court held that claims for damage from the operation of the defendant's facility constituted an "invasion of a right of private occupancy" giving rise to coverage under

the "personal injury" portion of the policy at issue. Given Louisiana's rules of policy interpretation that favor coverage, this Court finds that the Plaintiffs' claims fall within the definition of "personal injury" in each of the Insurers' policies issued to HANO.[1]

Additionally, the Court rejects the Insurers' arguments regarding the time of manifestation of the Plaintiffs' injuries, finding that it does not apply to a claim for "personal injury" under their policies. HANO's Insurers argue that because the Plaintiffs did not know their property was contaminated, and did not begin to suffer emotional distress until 1994, their injuries did not manifest, *i.e.* "occur" within the policy period. In *Celotex*, the Court concluded that the insurance coverage is triggered by the mere exposure to the harmful conditions during the policy period. 599 So. 2d at 1076-77. The Court reasoned that the exposure theory comports with a literal construction of the policy language, maximizes coverage,

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[1] The Court recognizes that some other jurisdictions have held that personal injuries do not include claims such as those asserted in this case. *See* e.g. *Lakeside Non-Ferrous Metals, Inc. v. Lakeside Ins. Co.*, 172 F.3d 702 (9th Cir. 1999); *Harrow Products v. Liberty Mut. Ins. Co.*, 64 F.3d 1013 (6th Cir. 1995). However, these other jurisdictions have based their decisions on grounds not applicable under Louisiana law. Those jurisdictions that have declined to find coverage under the personal injury coverage have done so not on the grounds that the claims could not reasonably be interpreted to fall within the definition of "personal injury," but because to do so would render as ineffective unambiguous pollution exclusion language applying to other coverage parts. This rationale does not apply under Louisiana law, because: (1) Louisiana law does not consider such pollution exclusions unambiguous; and (2) Louisiana law requires that policy exclusions be strictly and narrowly construed ***in favor of*** coverage. *Doerr v. Mobil Oil Corp.*, 00-0947 (La. 12/19/00); 774 So. 2d 119.

and honors the contracting parties' intent by providing for consistency between the insured's tort liability and the insurer's coverage. *Id.*

Here, the "personal injury" coverage in their policies does not place any restrictions on when the damages must occur for coverage to arise. Instead, the "personal injury" coverage portion in each of their policies states that the policy will provide coverage for all damages arising from an invasion of a right to a private occupancy regardless of the date of manifestation of the injury. For the coverage to apply, all the policies require is for the "invasion of the right of private occupancy" to take place during the policy period.

The Court finds that the Plaintiffs' emotional distress claims are claims for "bodily injury" under each of the policies that the Insurer Defendants issued in favor of HANO. Louisiana courts have construed claims for emotional distress to be claims for "bodily injury" for purposes of insurance coverage, and this Court follows that jurisprudence. *Crabtree v. State Farm Ins. Co.*, 93-0509 (La. 2/28/94), 632 So. 2d 736; *Levy v. Duclaux*, 324 So. 2d 1 (La. App. 4th Cir. 1975), *writ denied* 328 So. 2d 887 (La. 1976).

For example, in *Crabtree*, the Louisiana Supreme Court held that emotional injuries are "sickness or disease," because "[w]hile such an experience operates primarily on the mind of the victim such suffering cannot be isolated from the body." 632 So. 2d at 743. The Supreme Court went on to say, "We are unable to separate a person's nerves and tensions from his body." *Id.*

Therefore, the Court finds that the Plaintiffs' claims for emotional distress as a result of HANO's

negligence are claims for "bodily injury", which are covered by each of the Insurers' policies issued in favor of their insured, HANO.

Contributory Negligence

Defendants assert that plaintiffs are contributorily negligent for any diminution in their property values because they put signs on their property to alert the public that there were toxins in the soil. It was not plaintiffs who developed low-income housing and a school on a former landfill. Plaintiffs were given the promise of the American dream of homeownership wrapped in a poisonous box. The only mechanism they had to be heard was in part to bring attention tc the severity of the situation with such publicity. The Court finds this defense utterly without merit.

7. DAMAGES

Loss of Property Value

A. Property directly on the ASL site

The Court accepted Kermit Wayne Williams as an expert appraiser with an emphasis on stigma damages of real property affected by environmental problems. He was the only witness, who testified at the trial, who had performed an actual appraisal of the Plaintiffs' properties.[2] According to Mr. Williams, the toxic and hazardous contamination in the soil at the ASL site is an "incurable defect" in the properties, such that the Class Members are not economically or physically able to cure the problem

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[2] The Defendants' only property expert, Jimmie Thorns, was not asked to perform an appraisal of the homes, and apparently did not even go inside the Plaintiffs' homes.

through their own efforts. As Mr. Williams explained, given the socioeconomic status of the Plaintiffs, and the nature of the contamination, "The only way, in my opinion, it can be cured is to abandon the entire site and relocate." The Court agrees.

The Court finds that the Class Members' property, within the boundaries drawn by the United States Environmental Protection Agency in 1994 ("the ASL site"), cannot be fully and adequately environmentally remediated without the complete destruction of their homes or businesses. Accordingly, the stigma associated with being located directly on top of a Superfund Site, the permanent land use restrictions placed on the Class Members' properties (including the property owners' continuing obligation to maintain the semi-permeable barrier that now separates the clean topsoil from the contaminated soil), and the continuing presence of more than 140 toxic and hazardous materials directly under the Class Members' homes and businesses, have all combined to reduce the value of their properties to such a diminished state as to render them unmerchantable and worthless.

The Court is convinced that the Plaintiffs did not know before they moved to the ASL site that it was located on the City's former landfill. The Court is satisfied that if the Plaintiffs had known the true condition of the ASL site before they purchased their properties, or if they had been advised that their property was located on a former municipal landfill, they would not have agreed to buy property on the ASL site.

The Court finds, therefore, that all Class Members who owned property (whether developed or un-

developed) before February 1, 1994, within the boundaries drawn by the United States Environmental Protection Agency in 1994 ("the ASL site"), and did not know before their purchase that their property was located on a former municipal landfill, are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's insurers (according to the years of their policies and coverage), in the full amount of their present fair market value, as that value is determined at the time they are appraised in support of their claims.

B. Property in the "adjacent area"

The Court finds that the Class Members who owned property (whether developed or undeveloped) before February 1, 1994, within the "adjacent area" (located within the boundaries of the Class and between Montegut and Feliciana Streets and the West side of Louisa Street), have suffered a diminution of value in their properties, due to the stigma associated with their close proximity (some as close as directly across the street) to the ASL "Superfund Site" ("the ASL site"). Further, they were exposed to the same contaminants as those who lived on the site during the construction and remediation.

Accordingly, the Court finds that these Class Members are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's insurers (according to the years of their policies and coverage), in the amount of ten percent (10%) of their present fair market value, as that value is determined at the time they are appraised in support of their claims.

Mental and Emotional Distress

Louisiana recognizes claims for emotional distress, with limitations to protect against purely speculative or *de minimus* claims. In *Bonnette v. Conoco*, 837 So. 2d 1219 (La. 2003), plaintiffs sought compensatory damages for damages for fear of cancer, among others. The Bonnette Court considered whether plaintiffs could recover for past, present, and future mental anguish without accompanying physical injury. The Court recognized that such compensation occurs when there is an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." 837 So. 2d at 1234. The Court recognized that there are inherent problems in awarding damages for mental disturbance in the absence of manifest physical injury particularly in cases involving exposure to asbestos or other carcinogens. *Id.* Thus, the Court held that:

> [U]nder the rule announced in *Moresi*, which must be stringently applied in asbestos exposure cases due to their inherently speculative nature, in order for plaintiffs to recover emotional distress damages in the absence of a manifest physical injury, they must prove their claim is not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances.

In *Moresi v. State, Dept. of Wildlife and Fisheries*, 567 So. 2d 1081 (La. 1990), to which the Court refers, two 18-year olds were stopped by game wardens who suspected the boys of violating the duck hunting limit. The total time that the boys were detained

was less than one hour. Following this incident, a State employee put a note on the front door of their fathers' hunting camp indicating that the State was "after them and would get them next time." The boys' fathers filed suit for a violation of their sons' civil rights, and claimed that the note on the door caused the boys to suffer mental distress. There were no other allegations of harm or injury.

The district court awarded damages of $43,000, which included an award to each plaintiff of $1,000 for mental distress, punitive damages of $4,000, and attorneys' fees of $32,939.10. On appeal, the Third Circuit affirmed the compensatory award, reversed the punitive damage award, and reduced the attorneys' fees. The Supreme Court went one step further and reversed the award of damages for mental distress.

In reversing the mental distress damages, the Supreme Court observed that the case did not involve a separate tort such as "assault, battery, false imprisonment, trespass to land, nuisance, or invasion of the right to privacy." *Id.* at 1095. The Supreme Court reasoned that some other circumstances or types of harm are usually required in such cases to serve as a guarantee that the claim is genuine.

Unlike the Plaintiffs in this case, the boys in *Moresi* were not told that their children could not play outside in the dirt, or that they could not grow and eat vegetables in their yard. They were not told to take extra measures to clean dust from their homes several times each day. The 18-year-olds in *Moresi* were not told that they had been living on a Superfund Site for twenty years or longer. They were not

told that there were 149 toxic materials on their property, and that 49 of them are known to cause cancer in humans. They did not have to face the loss of their investments in the most valuable thing they own – their homes.

If ever there were a case where there were special circumstances to create a particular likelihood of genuine and serious mental distress, this is the case. Plaintiffs in this case learned in 1993 that for more than twenty years they had been living and were still living on some of the most toxic soil in the country. The Court observed the Plaintiffs as they testified about their thoughts, feelings, fears, and concerns. The Court finds their testimony to be credible and reasonable, given their unique circumstances. It is not every day that a court is faced with Plaintiffs such as these who are living directly on one of the most contaminated sites in the county. The Court finds that suffering the compounded fear, worry, anxiety, and concern is considerably more than a "mere inconvenience". The Court finds, therefore, that these unique facts meet the "special circumstances" described in *Moresi* and *Bonnette*, and that the Plaintiffs' claims for emotional distress damages are not spurious.

C. Orleans Parish School Board

The Court finds the Orleans Parish School Board's conduct particularly offensive and egregious because of its heightened duty in the realm of elementary school children. For the former full time students and full time employees of Moton Elementary School, the Court finds that these Class Members are entitled to emotional distress damages based on their years of attendance or employment at

Moton School. From the 1986-87 school year through the 1993-94 school year, these former students and employees were not advised that their School was located directly on top of contaminated soil, and they were not told of the dangers associated with exposure to the numerous toxic and hazardous materials in the soil on the School property.

Nevertheless, in 1994, when the United States Environmental Protection Agency declared a portion of the ASL neighborhood to be a "Superfund Site", the Moton School property was included within the "Superfund" boundaries. This caused these Class Members to suffer extreme stress beginning in 1994, when the EPA first published its findings from soil testing at the ASL site, and resulted in the closure of the School in 1994.

The Court recognizes that the School Board performed a partial remediation of the Moton School site before the School was built and occupied, but there is no barrier of any kind separating the clean topsoil from the contaminated soil just three feet below the surface. Nor was any barrier installed or constructed to prevent or restrict the contaminants from migrating upward to the surface. Further, and despite the warnings issued years earlier by its own consultants, the School Board breached the topsoil barrier in 1992, when it engaged in extensive underslab plumbing repairs at Moton that were carried out while School was in session. Finally, the School Board has not demonstrated that it established a plan or system for routinely testing the Moton School site to ensure that the contaminants in the soil throughout the School property are not migrating upward to the surface, despite their consultants' recommendations to do so.

Through the trial testimony of 19-year-old Diarra McCormick, the Court finds that the stress suffered by these Class Members since 1994 is of a type that is so unique and extraordinary in nature that it is not merely speculative, but is real and compensable. The Court, therefore, finds that these Class Members are entitled to compensation from the Orleans Parish School Board in the amount of $2,000.00 for each year of their full time attendance or full time employment at Moton School from and including the 1987-88 school years through and including the 1993-94 school years.

D. Plaintiffs directly on the ASL site

The Court finds that the Class Members who lived or worked directly on the ASL site (that portion of the ASL neighborhood located within the EPA's 1994 "Superfund" boundaries) have suffered mental and emotional distress due to the shocking realization in 1994 that their homes and businesses were located on a "Superfund Site". These Class Members began to suffer extreme stress in 1994, when the EPA first published its findings from soil testing at the ASL site, and placed the site on the National Priorities List ("NPL").

The Court finds that the stress suffered by these Class Members since 1994 is of a type that is so unique and extraordinary in nature that it is not merely speculative, but is real and compensable. Although there is no evidence of any Class Member having been diagnosed with a personal injury or disease that has been causally related to the contaminated soil, the actual and extensive damage to the Class Members' property has been clearly established. The Court notes, in particular, that it cost

the EPA more than $20 million to perform a partial remediation in 2000-2001 of only approximately ten percent of the site, leaving ninety percent of the toxic and hazardous materials in place on the Class Members' property. Accordingly, the Court finds that these Class Members are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's insurers according to the years of their policies and coverage.

In 2000-2001, the EPA performed a partial remediation of approximately ten percent of the ASL site. The contaminants at the very surface of a portion of the ASL site were excavated and replaced with clean soil. There was no excavation of the contaminated soil under the streets or under any homes or buildings. A semi-permeable barrier was installed between the clean topsoil and the contaminated soil that is just two feet below the surface and less than two feet in some areas due to the presence of underground utilities, water lines, phone lines, and the like.

Although the partial remediation may have reduced the most immediate health risk from hazardous exposures that the Class Members previously faced, the Court finds that this reduced health risk exists only as long as the semi-permeable barrier is not breached. The Court notes that the Class Members themselves are now responsible for protecting and maintaining the integrity of the barrier. Placing this kind of responsibility on these Class Members, especially given their socioeconomic status, creates additional stress and future concerns. Further, the EPA will continue to conduct five-year assessments indefinitely. The uncertainty of knowing what these five-year assessments will reveal, particularly con-

sidering the history of deception, the Court finds that the Class Members are entitled to compensation for emotional distress based on their years of residence on the ASL site. The Court notes that the ASL site has recently been devastated by Hurricanes Katrina and Rita, which rendered the site uninhabitable. Therefore, the Court finds that August 29, 2005 is an appropriate cut-off date for assessing damages.

The Court finds that it is reasonable for each Class Member's emotional distress to be proportional to the length of time they have lived or worked on the ASL site and were thereby exposed on a daily basis to the hazardous and toxic materials that were at the surface of their properties and at a depth of twenty feet in the soil. Therefore, for each Class Member who lived or worked directly on the ASL site, and within the EPA's 1994 boundaries, the Court finds that it is appropriate for each of them to be compensated for their emotional distress in direct proportion to the length of time they lived or worked on the ASL site up through and including August 29, 2005.

The Court, therefore, awards these Class Members the following amounts based on their years of residence:

For 1- up to 5 years	$4,000.00 (per year)
For 5- up to 10 years	$25,000.00 (total)
For 10- up to 15 years	$30,000.00 (total)
For 15- up to 20 years	$40,000.00 (total)
For 20 years or more	$50,000.00 (total)

E. Plaintiffs in the "adjacent area"

For residents of the "adjacent area", the Court finds that although they are entitled to damages for the emotional distress they suffered from learning in 1994 that they had been living or working directly adjacent to a "Superfund Site" for many years, they are not entitled to the same level of compensation as the Class Members who lived or worked directly on the contaminated property, and within the EPA's 1994 boundaries. Therefore, the Court awards each Class Member, who lived or worked for one full year in the "adjacent area" before February 1, 1994, the total amount of $2,500.00 in emotional distress damages.

8. ORLEANS PARISH SCHOOL BOARD'S CROSS CLAIM AGAINST CITY OF NEW ORLEANS AND HANO

The School Board asserted a claim against the City of New Orleans in its capacity as a prior owner of the land and operator of the former landfill under the Hazardous Waste Control Law ("HWCL"), La. Rev. Stat. § 30:2276. The legislature enacted the HWCL to identify sites at which hazardous substances may have been disposed or discharged and to provide a way for the Department of Environmental Quality (DEQ) to insure that those who contributed to the discharge or disposal are responsible for the costs of cleaning up the site. *Margone, L.L.C. v. Addison Resources, Inc.*, 896 So. 2d 113, 116 (La. App. 3 Cir. 2004). If a person voluntarily cleans up a hazardous waste site before the Secretary demands remediation, that person may sue other alleged responsible parties for remediation costs, as long as the Secretary approved his remediation plan. *Id.*

No action shall be commenced under this Chapter unless it is commenced within ten years from the date of the discovery of the disposal or discharge for which remedial action must be undertaken. La. Rev. Stat. § 30:2276(H)(1). However, such action shall be barred if the plaintiff does not make written demand on the defendant by certified mail, return receipt requested, at least sixty days prior to initiation of suit based on the cause of action provided in this Subsection. La. Rev. Stat. § 30:2276(G)(3). The School Board did not provide proof that it complied with section (G)(3). Accordingly, the Court dismisses the School Board's claim against the City of New Orleans for contribution under HWCL.

The School Board also claims that it is a class plaintiff against HANO. The School Board claims it suffered stigma damages and diminution of property value due to HANO's failure to act. The School Board claims that it would not have been placed on the Superfund list if HANO had followed the recommendations of consultants it hired prior to the development of the ASL site. The Court finds that the School Board knew of any potential claims against HANO when it discovered the nature of the site in 1983. Such delictual actions are subject to a one-year liberative prescriptive period. The Court finds that the School Board's claims in the capacity of class plaintiff are prescribed.

9. COSTS, EXPENSES, JUDICIAL INTEREST

The Court finds that the City, HANO and its Insurers, and the School Board are each liable to the Plaintiffs for one-third of the Plaintiffs' costs and expenses that are chargeable to this trial.

The Court also finds that the City, HANO and its insurers, and the School Board are each liable to the Plaintiffs for their respective percentages of pre-Judgment interest in the amount prescribed by law, and for all post-Judgment interest until paid in the amount prescribed by law.

REASONS FOR JUDGMENT RENDERED AND SIGNED at New Orleans, Louisiana, this 12th day of January, 2006.

/s/ Nadine M. Ramsey
Nadine M. Ramsey, Judge

APPENDIX D

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

410 Royal Street
New Orleans, LA 70130-2199

Clerk's Office, New Orleans, this February 27, 2008

To Whom It May Concern:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED.

JOHN JOHNSON, ET AL.

VERSUS

ORLEANS PARISH SCHOOL BOARD, ET AL.

REHEARING APPLICATIONS FILED BY: CITY OF NEW ORLEANS, U.S. FIRE INSURANCE CO., NATIONAL UNION FIRE INSURANCE CO., REPUBLIC INSURANCE CO.

CASE NO. 2006-CA-1223

CANNIZZARO, J., VOTED TO GRANT

Sincerely,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX E

The Supreme Court of the State of Louisiana

JOHN JOHNSON, ET AL.

VS. NO. 2008-C-0664

ORLEANS PARISH SCHOOL BOARD, ET AL.

IN RE: U.S. Fire Insurance Co.; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. J, Nos. 93-14333, 94-5446, 94-12996, 95-13271; to the Court of Appeal, Fourth Circuit, No. 2006-CA-1223

June 27, 2008
Denied.

JTK
CDK
BJJ
CDT
JLW

CALOGERO, C.J., would grant.
VICTORY, J., would grant.

Supreme Court of Louisiana
June 27, 2008

/s/ Katherine A. Fontana
Deputy
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

JOHN JOHNSON, ET AL.

VS. NO. 2008-C-0671

ORLEANS PARISH SCHOOL BOARD, ET AL.

IN RE: Louisiana Insurance Guaranty Association as Successor to Southern American Insurance Co. ; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. J, Nos. 95-13271, 93-14333, 94-5446, 94-12996; to the Court of Appeal, Fourth Circuit, No. 2006-CA-1223

June 27, 2008
Denied.

JTK
CDK
BJJ
CDT
JLW

CALOGERO, C.J., would grant.
VICTORY, J., would grant.

Supreme Court of Louisiana
June 27, 2008

/s/ Katherine A. Fontana
Deputy
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

JOHN JOHNSON, ET AL.

VS. **NO. 2008-C-0675**

ORLEANS PARISH SCHOOL BOARD, ET AL.

IN RE: National Union Fire Insurance Co. of Pittsburgh, PA; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. J, Nos. 93-14333, 94-5446, 94-12996, 95-13271; to the Court of Appeal, Fourth Circuit, No. 2006-CA-1223

June 27, 2008
Denied.

JTK
CDK
BJJ
CDT
JLW

CALOGERO, C.J., would grant.
VICTORY, J., would grant.

Supreme Court of Louisiana
June 27, 2008

/s/ Katherine A. Fontana
Deputy
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

JOHN JOHNSON, ET AL.

VS. NO. 2008-C-0682

ORLEANS PARISH SCHOOL BOARD, ET AL.

IN RE: Republic Insurance Co.; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. J, Nos. 93-14333, 94-5446, 94-12996, 95-13271; to the Court of Appeal, Fourth Circuit, No. 2006-CA-1223

June 27, 2008
Denied.

JTK
CDK
BJJ
CDT
JLW

CALOGERO, C.J., would grant.
VICTORY, J., would grant.

Supreme Court of Louisiana
June 27,,2008

/s/ Katherine A. Fontana
Deputy
Clerk of Court
For the Court

APPENDIX F

The Supreme Court of the State of Louisiana

JOHN JOHNSON, ET AL.

VS.

ORLEANS PARISH SHOOL BOARD, ET AL.

NOS. 2008-C-0671
2008-C-0664
2008-C-0675
2008-C-0682

IN RE: Louisiana Insurance Guaranty Association as Successor to Southern American Insurance Co. - Defendant; Applying for Reconsideration of this Court's Action dated June 27, 2008; Parish of Orleans, Civil District Court, Div. J, Nos. 95, 13271, 93-14333, 94-5446, 94-12996; to the Court of Appeal, Fourth Circuit, No. 2006-CA-1223.

September 19, 2008

Not considered. See Louisiana Supreme Court Rule IX, Section 6.

PFC
CDK
BJJ
JPV
CDT
JTK
JLW